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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *ET AL.*,

Petitioners,

v.

BERETTA U.S.A. CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

Section 4(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7903 (5)(A)(iii) (2005), bars certain lawsuits against the firearms industry when based on state common law, but allows the same claims when based on a state statute "applicable to the sale or marketing" of firearms, thus preempting state law based on which branch of state government authorized it rather than based on the sweep or content of the state law.

1. Does the Tenth Amendment prohibit Congress from preempting state law based only on whether the law is the product of legislation rather than authoritative judicial decision?

2. Are cases alleging a violation of the Tenth Amendment evaluated solely on whether the federal action being challenged "commandeers" a state executive or legislative officer, or does the analysis also include whether the challenged action attempts to revise or interfere with the structure and sovereign decisions of state government?

3. Do this Court's statutory construction canons and preemption jurisprudence allow courts to construe the language of the PLCAA to preempt state product liability actions broadly despite Congress' clearly stated intent not to bar such actions?

PARTIES TO THE PROCEEDINGS

Petitioners are Hector Adames, Jr. and Rosaliz Diaz as co-special executors of the estate of Joshua Adames, deceased.

Respondent is Beretta U.S.A. Corporation.

Because Petitioners are questioning the constitutionality of a federal statute, 15 U.S.C. §§ 7901-7903 (2005), 28 U.S.C. § 2403(a) (1976), may apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Hector Adames, Jr., *et al.*, respectfully Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App., *infra*, 1a-47a) is reported at 909 N.E.2d 742 (Ill. 2009), the Illinois Court of Appeals decision (App. 49a-100a) is reported at 880 N.E.2d 559 (Ill. Ct. App. 2007), and the order of the Illinois Circuit Court granting Defendant Beretta's Motion for Summary Judgment (App. 103a-104a) is unreported but available at 2005 WL 6088769 (Ill. Cir. Ct. Aug. 23, 2005).

JURISDICTION

The Illinois Supreme Court's judgment was entered on March 19, 2009. A timely petition for rehearing was denied on May 26, 2009 (App. 101a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2008).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

(See Appendix 105a-115a)

INTRODUCTION

This case raises core issues of federalism and statutory construction that have confounded the lower courts, and require clarification from this Court: Does the Tenth Amendment permit Congress to dictate which branch of state government may authorize liability against a particular industry so long as the federal enactment does not "commandeer" state officials? In upholding the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et. seq.*, the Illinois Supreme Court – like the Second Circuit before it – answered that question affirmatively, deferring to Congress when it determined which branch of state government it would recognize as the authoritative expositor of state law, as well as limiting the scope of the Tenth Amendment to its anti-commandeering principle. The approach adopted by those two courts cannot be reconciled with our system of federalism and this Court's guidance is needed to establish the scope of that Amendment's structural limitation on congressional power, as well as to resolve the conflict among the circuits.

This Court's guidance is further needed to clarify whether the Illinois court properly construed federal law and this Court's preemption jurisprudence when the Illinois court held that the PLCAA broadly preempted state law, even though the structure, purpose, and legislative history of the Act establish that Congress did not intend to bar products liability claims such as Petitioners'. Determining the scope and breadth of the PLCAA is an issue of pressing national importance that courts nationwide are continually struggling with and which requires this Court's definitive construction.

STATEMENT OF THE CASE

A. The Statutory Scheme

The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et. seq.*, enacted by Congress on October 26, 2005, orders every court, state or federal, to "immediately dismiss" any "qualified civil liability action" (hereafter, "Qualified Action") pending on the date of enactment, and to bar the courthouse doors to all future Qualified Actions. 15 U.S.C. § 7902(a), (b). With certain exceptions, a Qualified Action is defined as any proceeding brought "against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A).

The PLCAA states its operative purpose as prohibiting causes of action against firearms companies and trade groups "for the harm *solely caused*" by criminal or unlawful misuse of guns or ammunition, when the product functioned as intended. *Id.* at § 7901(b)(1) (emphasis added).

The PLCAA establishes that certain categories of proceedings are not Qualified Actions, including, significantly, certain product liability actions, 15 U.S.C. § 7903(5)(A)(v), and actions that allege that the "manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product," a limitation known as the predicate exception. *Id.* at § 7903(5)(A)(iii); App. 111a. Under the predicate

exception, an action identical to one that could not be brought because it was a product of judicial decision or state common law is exempted when it is a product of state or federal legislative authorization.

In findings supporting the act, Congress made clear its anti-judicial, pro-legislative objective in enacting the PLCAA. In its view, certain liability actions against gun manufacturers and dealers had been brought "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* at § 7901(a)(7). To Congress, such actions could only be sustained by a "maverick judicial officer or petit jury [and] would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." *Id.* Thus, the PLCAA exists as an expression of congressional pique at plaintiffs "us[ing] the judicial branch to circumvent the Legislative branch" and at judges the Congress viewed as complicit in that evasion. *Id.* at § 7901(a)(8). Moreover, Congress declared that one of the imperatives justifying the enactment of the PLCAA was the need for Congress to act to preserve each State's separation of powers. H.R. Rep. No. 109-124, at 20 (2005).

B. Proceedings Below

On May 5, 2001, thirteen-year old Billy Swan found his father's Beretta 92FS handgun and removed the magazine that contained its ammunition, believing that this action had unloaded the gun. The gun, however, did not contain one of several commonplace safety features that either

warned users when a round remained in the chamber or otherwise prevented the gun from firing when "unloaded" in this fashion. App. 4a. In fact, manufacturer Beretta did not equip the gun with safety features developed more than 100 years ago to prevent the "danger of an unintentional discharge of the cartridge,"[1] including a device "indicating whether or not a gun is loaded" to obviate "the many accidents occasioned by the discharge of guns that are not supposed to be loaded."[2] Believing the gun unloaded, Billy pulled the trigger of the "unloaded" gun, and the bullet hidden in the chamber killed his 13-year-old friend, Josh Adames. App. 4a-5a.

Petitioners, Josh's parents, filed this action in the Circuit Court of Illinois, alleging counts of design defect, failure to warn, and breach of the Implied Warranty of Merchantability. App. 14a. The complaint alleged that the firearm was unreasonably dangerous as Beretta failed to include effective warnings that indicated to foreseeable users when a round remained in the chamber or that alerted users that the gun could fire when its magazine was removed, as well as failed to include a magazine disconnect safety, a $10 device invented a century earlier to prevent precisely these sorts of accidents from occurring. App. 14a-15a.

On August 23, 2005, the Circuit Court granted Beretta's Motion for Summary Judgment. App. 103a-104a. Petitioners appealed the Circuit Court's dismissal of their design defect and failure to warn claims. App. 50a. The Illinois Court of Appeals

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[1] U.S. Patent No. 808,463 (issued Dec. 26, 1905).

[2] U.S. Patent No. 439,551 (issued Oct. 28, 1890).

affirmed the Circuit Court's decision that "summary judgment was proper" for the design defect claim. App. 85a. However, the Appellate Court held that the "plaintiffs' failure to warn claim presented a question of fact and should have survived summary judgment." App. 92a. The Appellate Court rejected Petitioners' claim that the PLCAA was unconstitutional, but held that Petitioners could bring a failure to warn claim under the PLCAA's product liability exclusion, § 7903(5)(A)(v). App. 92a. Both Petitioners and Respondent Beretta appealed to the Supreme Court of Illinois. The Supreme Court affirmed the Court of Appeals decision finding the PLCAA was constitutional, because it found that "the PLCAA does not commandeer any branch of state government because the PLCAA imposes no affirmative duty of any kind on any branch of state government." App. 45a.

The court also reversed the decision of the court below that had allowed the failure to warn claim to go forward, instead, holding that the PLCAA required dismissal of that claim as well. App. 46a. The Illinois Supreme Court found that the failure to warn claim fell within the immunity granted by the PLCAA because Billy's unintentional shooting of his friend with a gun he thought to be unloaded still constituted a "criminal offense," App. 46a, and constituted a "volitional act," even though "Billy did not intend the consequences of his act." App. 42a. The court held that Congress intended "volitional" to require no more than Billy "choose and determine to point the Beretta at Josh . . . [and] pull the trigger." App. 42a. The court therefore concluded that the Act's product liability exclusion did not apply and Petitioners' "failure to warn claims were barred by the PLCAA." App. 46a.

Because it concluded that the PLCAA barred Illinois courts from applying Illinois law to grant relief to Petitioners from Beretta, the court never considered Petitioners' contention that Beretta was liable for a defect in design under Illinois state law. *See* App. 46a. Moreover, the court never overruled the intermediate appellate court's decision that, under Illinois law, Petitioners' failure to warn claim could constitute an action arising "from a defect in design or manufacture of the product," and was thus actionable under § 7903(5)(A)(v). *See* App. 98a.

Petitioners filed a timely petition for rehearing with the Supreme Court of Illinois, which was denied on May 26, 2009. App. 101a.

REASONS FOR GRANTING THE PETITION

Granting this petition would enable this Court to resolve a fundamental and critical Congressional challenge to Our Federalism, as well as answer a persistent and recurring issue that has confounded the lower courts over whether justiciable Tenth Amendment concerns focus solely on the anti-commandeering principle.

Section 7903(5)(A)(iii) of the PLCAA, 15 U.S.C. § 7901 *et seq.* (2005), constitutes a breathtaking and unprecedented attempt to control how states make law by dictating which branch of state government may impose legally actionable duties upon a politically powerful industry. Rather than prescribe certain substantive limits on the content of such laws, the PLCAA dictates which branch may legally originate enforceable state-imposed duties. Congress indicated its approval of duties imposed by a cognate legislative body while overriding identical duties

when they are imposed by a state court applying state common law.

Congress indicated that it undertook this unprecedented expedition into the heart of state lawmaking in order to preserve each State's separation of powers, H. Rep. No. 109-124, at 20, a stance that raises important questions about the Tenth Amendment's force in support of state sovereignty. The problem posed grows exponentially when Congress takes such approach based solely on its Commerce Clause authority, as it did here. In today's challenging economic environment, the statute stands as an inviting model to provide relief to other industries resisting common-law liabilities and thus raises an issue of continuing and recurrent national importance.

The Illinois Supreme Court made basic and fundamental doctrinal errors in its federalism analysis. Like the Second Circuit before it, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 397 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009), the Illinois court improperly narrowed the Tenth Amendment's protection of state sovereignty to a simplistic inquiry into whether Congress has commandeered state executive or legislative branch officers by requiring them to undertake affirmative actions on behalf of the federal government. Giving our federalist system that limited scope ignores the "residuary and inviolable sovereignty" of the States, *Printz v. United States*, 521 U.S. 898, 899 (1997) (quoting THE FEDERALIST No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)), and their retention of "substantial sovereign powers" under our constitutional scheme. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). These retained powers "are

numerous and indefinite" and "extend to all the objects which, in the ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 458 (quoting THE FEDERALIST No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)).

In a case that alleges improper interference with a State sovereign's structural integrity, like this one, the Illinois Supreme Court asked the wrong question. Instead, this case required resolution of three key legal questions: (1) whether the statute appears to regulate the States as States; (2) whether the regulation concerns itself with attributes of state sovereignty; and (3) whether compliance would impair a state's ability to structure integral operations in areas of traditional governmental functions. The PLCAA fails such an inquiry and should not have been sustained.

This Court and many lower courts have consistently distinguished between permissible federal legislation directly regulating commerce and impermissible legislative interference with fundamental state decisions about the functioning and structure of their governments. However, in a series of recent cases, this Court has focused its attention on federal laws that impermissibly commandeered state executive or legislative action to carry out a federal regulatory scheme. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Erroneously, and in conflict with precedents of this Court and decisions of several circuits, the Supreme Court of Illinois has joined the Second Circuit in holding that Congress violates the Tenth

Amendment *only* when it engages in such commandeering. This unduly narrow reading of these cases significantly imperils state sovereignty. By granting this petition, this Court can clarify the proper scope of state sovereignty, the appropriate analysis of Tenth Amendment claims, and the limitations the Tenth Amendment imposes on congressional interference with fundamental functions of state government, such as the process of making law.

Importantly, these significant legal questions come to this Court in a lawsuit that best represents the interests that our federalist system is meant to protect, and at a time when the incentives for Congress to overstep its bounds are greatest. The questions arise out of an individual citizen's cause of action for serious harm allegedly caused by a defective product. As this Court has explained, state sovereignty is protected for the sake of individual citizens, *see New York*, 505 U.S. at 181, like the Plaintiffs in this case. Furthermore, in a time of economic crisis, Congress will have great incentive to take similarly restrictive legislature measures. However, the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 187). This case thus arises at a time when a robust reaffirmation of the Tenth Amendment limitations on Congress will be of the greatest importance.

At the same time, this petition presents this Court with the first opportunity to construe the extent to which a federal statute, the PLCAA,

displaces certain traditional state-law actions that the law's stated findings, purposes, structure, and legislative history indicate were not intended to be within the scope of the immunity conferred by the PLCAA. In holding that the PLCAA requires dismissal of the defective-design and failure-to-warn claims put forth by Petitioners, the Illinois Supreme Court took a road along the route of statutory construction that is at fundamental odds with this Court's instruction that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress," expressed either in an Act's language, or "implicitly contained in [the Act's] structure and purpose." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Moreover, just as this Court has held that "'the purpose of Congress is the ultimate touchstone in every pre-emption case,'" *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), the preemptive effect of the PLCAA should have been analyzed in terms of congressional purpose. If that had occurred, it is clear that the PLCAA would not have foreclosed Petitioners' lawsuit, as such products liability actions were outside the scope of Congress' concern in enacting the PLCAA.

I. THE UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT CONFLICTS WITH THE BROAD PROTECTION OF STATE SOVEREIGNTY IN THE HOLDINGS OF SEVERAL CIRCUIT COURTS AND THIS COURT'S PRECEDENTS

In following the Second Circuit's holding in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009), the Illinois Supreme Court limited the "'the critical inquiry with respect to the Tenth Amendment'" to "'whether the PLCAA commandeers the states." App. 44a (quoting *City of New York*, 524 F.3d at 396).

Under that skewed reasoning, any Act of Congress conforms to the Tenth Amendment so long as it does not commandeer the legislative or executive branches of the States. This view is inconsistent with the broad federalism concerns that this Court and several circuit courts have identified as crucial to the determination of whether Congress has intruded too deeply into fundamental attributes of state sovereignty. Our system of dual sovereignties is designed to prevent both the federal and state governments "from destroy[ing] the other [or] curtail[ing] in any substantial manner the exercise of its powers." *New York v. United States*, 505 U.S. 144, 163 (1992) (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)). The PLCCA transgresses that bright line, and the Illinois decision finds that transgression permissible, because it gives improperly short compass to the Tenth Amendment.

The underlying statute and the analysis employed by the decision below fail to show the proper deference to "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Besides its anti-commandeering mandate, federalism places limitations on congressional designs that interfere with the structure and operation of state government,[3] as well as on the scope of Congress' enumerated powers and authority to preempt state law.[4]

Congress' clearly expressed preference for legislative determinations of grounds for liability over judicial applications of the common law in the PLCAA dictate to the States how its law must be made, at least when liability is to be assessed against the firearms industry. 15 U.S.C. § 7903(5)(A)(iii) (creating an exception to the immediate-dismissal dictate so long as the lawsuit is authorized by certain legislative actions); *see also* 15 U.S.C. § 7903(2)(a)(7) (finding stating that liability actions against gun manufacturers and dealers could only be imposed "by a maverick judicial officer or petit jury [and] would expand civil liability in a manner never contemplated by the framers of the Constitution, *by Congress, or by the legislatures of the several States*")

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[3] *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 50 (1988).

[4] *See, e.g., United States v. Lucas*, 514 U.S. 549, 555 (1995) (recognizing that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

(emphasis added); *Id.* at § 7901(a)(8) (finding stating that plaintiffs in the actions intended to be preempted were "us[ing] the judicial branch to circumvent the Legislative branch").

The evident congressional pique at the judicial role in sustaining these lawsuits plainly establishes that the PLCAA expressed Congress' mandatory determination of which branch of state government will be recognized by the Federal Government as the authoritative expositor of the State's pertinent laws. Such an exercise of congressional power is at odds with this Court's repeated declarations that "rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). *See also Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

A congressional enactment, like the PLCAA, that denies state courts authority to declare the law and requires instead exclusive reliance on state legislatures for the definitive pronouncement of that state's law invades state sovereignty unconstitutionally, even when it does not "commandeer" any branch of state government. After all, it is "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) ("States are free to allocate the lawmaking function to whatever branch of state

government they choose.") (citations omitted); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (federal government may not require a state respect the federal system of separation of powers within its own government).

The Illinois decision below, and the Second Circuit decision upon which it relied, conflicts with the broader scope accorded the Tenth Amendment in other circuits. For instance, when the Fourth Circuit upheld the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228 (2000), it explained that a Tenth Amendment challenge to a federal statute involves two questions: (1) whether the law falls within the enumerated powers of Congress; and (2) whether the means of regulation employed impermissibly infringes upon state sovereignty. *United States v. Johnson*, 114 F.3d 476 480 (4th Cir.), *cert. denied*, 522 U.S. 904 (1997) (citing *New York*, 505 U.S. at 159, 188). To answer the second question, the *Johnson* court looked well beyond whether Congress had commandeered the states, explaining that in *New York*, this Court established the principle that Congress cannot adopt legislation that "effectively regulates the 'states as states' and thereby impermissibly invades by this means state sovereignty." 114 F.3d at 481.

Like the Fourth Circuit, when the First and Tenth Circuits upheld the CSRA, they looked at effects on state sovereignty well beyond commandeering. They set out "three ingredients" necessary to show that an act of Congress has violated the Tenth Amendment: "(1) the statute must

regulate the 'States as States,' (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability 'to structure integral operations in areas of traditional governmental functions.'" *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981) (internal citations and quotation marks omitted)); *accord United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997). The Third Circuit employs the identical test. *See Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308, 309 (3d Cir. 1982). *Cf. Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions.").

This test, which Petitioners submit is the correct test, calls for a deeper inquiry into a federal statute's impact on key elements of state sovereignty than that undertaken by the Illinois Supreme Court or the Second Circuit. Moreover, this approach is in harmony with this Court's anti-commandeering jurisprudence. The PLCAA clearly fails this test, as it infringes on states' authority to determine which branch of state government establishes liability standards to be applied by state courts, which are "attributes of state sovereignty," that "would directly impair [a state's] ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel*, 452 U.S. at 288 (citation omitted).

Each of these tests calls for a deeper inquiry into a federal statute's impact on key elements of state sovereignty. Moreover, these tests are in harmony with this Court's decisions annulling federal legislation for commandeering states. The decisions demonstrate that the Tenth Amendment protects state sovereignty from a wide range of threats. *See, e.g., New York*, 505 U.S. at 188 ("*Whatever the [other] limits of [state] sovereignty may be*, one thing is clear: The Federal government may not compel the States to enact or administer a federal regulatory program." (emphasis added)). When this Court said in *New York* that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," 505 U.S. at 162, it cited *Coyle v. Smith*, 221 U.S. 559, 564 (1911), a non-commandeering decision which upheld Oklahoma's right as a sovereign state to relocate its own capital without federal interference.

Like the Illinois Supreme Court and the Second Circuit, the Seventh and District of Columbia Circuits limit their Tenth Amendment analyses to the anti-commandeering principle. *See United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999). The clear conflict between decisions of these circuits, as well as the Second Circuit and the Illinois Supreme Court, with decisions of the First, Fourth, Fifth, and Tenth Circuits require resolution by this Court.

II. THE UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT PRESENTS AN ISSUE OF GREAT NATIONAL IMPORTANCE

If Congress, in the exercise of its Commerce Clause power may dictate which branch of state government is the authoritative expositor of state law, our system of dual sovereignty, "each protected from incursion by the other," *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (citation omitted), is endangered. Reliance solely on the anti-commandeering principle to protect state sovereignty, as the court below held appropriate, is inadequate to serve our federalist system and provides but one method by which to evaluate whether the federal government has usurped the states' constitutional role.

Because of the fundamental importance of federalism to our constitutional structure, this case provides an important opportunity for this Court to define the contours of the protections afforded to state sovereignty by the Tenth Amendment. As this Court noted in *New York*, the Constitution protects state sovereignty not for the sake of state government or state officers, but for the benefit of the individual citizen. 505 U.S. at 181. The boundaries of our federalism must be respected so that citizens know whom to hold accountable with respect to their laws. *See id.* at 168.

Beyond Congress' lack of authority to restructure state government, *see Gregory*, 501 U.S. at 460, or to determine which branch of state government may discharge which governmental duties, *see Clover Leaf Creamery Co.*, 449 U.S. at 463, Congress erred when

it thought it had the power to preserve state separation of powers, H.R. Rep. No. 108-59, at 19 (2003), and to prevent plaintiffs from "us[ing] the [state] judicial branch to circumvent the [state] Legislative branch." *Id.* at § 7901(a)(8). *See Sweazey v. New Hampshire*, 354 U.S. 234, 256 (1957) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states.") (Frankfurter, J., concurring).

Moreover, this is not an instance of preemption as it has heretofore been understood. Although Congress may preempt state law under the Supremacy Clause by creating a different and separate federal rule, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), Congress has not engaged in that type of replacement of state law. The PLCAA preempts state law that authorizes certain litigation against the gun industry when that authorization is the product of the common law or judicial construction, but permits each State to reclaim that authorizing prerogative through state legislation. Under the PLCAA, states retain their preexisting discretion to define the legal duties of firearms dealers and manufacturers and create causes of action for breaching those duties. However, Congress directed that this state authority must be exercised through statutes "applicable to the sale or marketing" of firearms, rather than more generally or through judicial construction. 15 U.S.C. § 7903(5)(A)(iii). Thus, Congress has evinced no intention to preempt state law, only to displace state judicial authority. That power, however, is "reserved by the Constitution to the several States." *Erie R.R. Co*., 304 U.S. at 80. It is axiomatic that the "case for

federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U. S. 141, 166-67 (1989) (internal quotation marks omitted). Here, Congress has not prohibited all third-party lawsuits against the gun industry. Instead, it has acted only on the basis of an anti-judicial animus that is outside its power. There is no constitutional warrant for that concern.

It is clear that Congress' purpose in enacting the PLCAA to prevent a "maverick judge or petit jury" from imposing civil liability against a firearms manufacturer, dealer, or importer, without prior legislative approval, cannot supply a legitimate justification for its obvious interference with choices belonging to each sovereign state and cannot be considered a proper exercise of Commerce Clause authority. Thus, the PLCAA is not standard economic regulation under the Commerce Clause in which Congress defines legal duties regarding some aspect of interstate commerce and sweeps aside state regulation in the field. *See FERC v. Mississippi*, 456 U.S. 742, 759 (1982). Instead, the target of § 7903(5)(A)(iii) is the ability of state courts to interpret state statutes and make common law. Congress' intent as evidenced from the text of the PLCAA was thus to restrain state courts in their exercise of what some might view as state lawmaking power, rather than regulate the content of state law.

This intent to nullify state court lawmaking is also apparent in the law's legislative history. The

House Judiciary Committee "recognized the phrase 'state law' to include common law as well as statutes and regulations," H. Rep. No. 109-124, at 19 (2005) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)), and said Congress' objective was to preserve separation of powers, which it described as "'implicitly embedded' in the constitutions and laws of every state." *Id.* at 20 (quoting *City of S. Euclid. v. Jemison*, 503 N.E.2d 136, 138 (Ohio 1986)). Congress claimed it was protecting democratic processes from plaintiffs "seeking to achieve through the courts what they have been unwilling or unable to obtain legislatively." H. Rep. No. 109-124 at 20; *see also* 151 Cong. Rec. S9088 (daily ed. July 27, 2005) (statement of Sen. Craig) (arguing that legislators, not courts, should toughen firearms regulation, if necessary). Indeed, PLCAA supporters contended that 33 state legislatures had adopted limitations on their courts akin to those in the PLCAA. *Id.* at S9099; *id.* at H8885 (daily ed. Oct. 18, 2005) (statement of Rep. Bass). Thus the net effect of § 7903(5)(A)(iii) is to impose similar limits on courts in the remaining states whose democratically elected representatives did not see fit to draw Congress' desired boundaries between statutory and common law regulation.

The PLCAA thus dictates to the states which branch of their government may authoritatively articulate state law: the legislature can, the courts cannot. This is an invasion of the kind of state-government decisions that this Court explained in *Gregory v. Ashcroft* are "of the most fundamental sort for a sovereign entity." 501 U.S. at 460. Decisions regarding "the separate duties of the judicial and political branches of the state governments . . . 'go to the heart of representative government.'" *Alden*, 527

U.S. at 751 (quoting *Gregory*, 501 U.S. at 461)). Whether a law is "declared by [the state's] Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co.*, 304 U.S. at 78. Furthermore, Congress' separation of powers concerns are of no moment, for "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United* States, 445 U.S. 684, 689 (1980).

If the ability to decide judges' qualifications—the state power at issue in *Gregory*—lies at "the heart of representative government," 501 U.S. at 463, the same must be true when states determine the respective roles of their legislatures and courts in lawmaking, the most fundamental sovereign power. *See Clover Leaf Creamery Co.*, 449 U.S. at 463 ("States are free to allocate the lawmaking function to whatever branch of state government they may choose."). Thus, when Congress abrogated the authority of state courts to declare state law and allocated that authority exclusively to state legislatures, it disregarded the wise restraints placed on it by the Constitution. This invasion of state sovereignty must be held unconstitutional.

This unprecedented incursion into the heart of state governmental structure is an issue of great national importance that requires this Court's attention.

III. THIS COURT SHOULD DETERMINE WHETHER THE PLCAA BROADLY PROHIBITS STATE COURTS FROM APPLYING ESTABLISHED STATE PRODUCT LIABILITY LAW

The Illinois Supreme Court held that the PLCAA preempts a broad class of products liability actions, traditionally available to injured plaintiffs, even though Congress sought to preempt only those claims "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). The decision contravened this Court's repeated holdings that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). By ignoring congressional intent and abandoning traditional canons of statutory construction, the Illinois court gave the federal statute a scope and meaning that would inappropriately bar the courthouse doors to thousands of children and adults injured or killed as a result of defective guns.

Granting certiorari will enable this Court to provide much-needed clarification and guidance to courts repeatedly faced with construing the scope of this unprecedented law and will restore the proper authority of state courts to apply established law in cases where conduct long held tortious causes injury, consistently with Congress' declared intent.

A. Guidance is Needed Over How to Apply this Court's Canons of Statutory Construction to the PLCAA

The Illinois Supreme Court made no attempt to ascertain congressional intent with respect to traditional product liability actions, despite this Court's instruction that such intent guides the preemption determination. Congress exempted most products liability actions from the types of actions barred, including actions

> for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v).

As explained by the PLCAA's sponsors, under this product liability exception gun manufacturers would still be liable for their own negligence, defective manufacturing or failure to provide sufficient warnings about the safety of their product. For example, Senator George Allen, a prominent PLCAA sponsor, stated on the Senate floor, "This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on the [sic] firearms dealer or manufacturer or defective product,

a standard in product liability law." 151 Cong. Rec. S9389 (daily ed. July 29, 2005). The bill's floor leader and principle sponsor, Senator Larry Craig, made clear that the PLCAA "stops only one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over which they have no control." 151 Cong. Rec. S9088 (daily ed. July 27, 2005). Senator Craig emphasized that the "bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry." 151 Cong. Rec. S9395 (daily ed. July 29, 2005). *See also* 151 Cong. Rec. S9099 (daily ed. July 27, 2005) (Sen. Craig) ("As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . If manufacturers or dealers break the law or commit negligence, they are still liable."); 151 Cong. Rec. S9107 (daily ed. July 27, 2005) (Sen. Baucus) ("This bill . . . will not shield the industry from its own wrongdoing or from its negligence."); 151 Cong. Rec. S9226 (daily ed. July 28, 2005) (Sen. Graham) (the Act "doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell," but Congress was "not going to extend it to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product").

Instead, the bill's sponsors stressed that "[t]he only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle." 151 Cong. Rec. S9099 (daily ed. July 27, 2005) (Sen. Craig). *See also* 15 U.S.C. § 7901(a)(7) (stating the purpose was to prohibit lawsuits "based on theories without

foundation in hundreds of years of the common law and jurisprudence of the United States."). Congress made plain that the object of the legislation was to prevent "an expansion of liability" beyond familiar common law concepts; in fact, one legislative finding referred to this liability "expansion" three times. *Id.*

The Act's findings, purposes, and legislative history establish Congress' intent to bar only suits that imposed liability on the gun industry where the gun manufacturer or seller did no wrong, but their products were used in crime.[5] They specifically preserved traditional product liability lawsuits like the instant action.[6] Because the Illinois Supreme Court's approach to preemption is at odds with this Court's pronouncements, threatens to undermine products liability lawsuits involving the firearm industry throughout the nation, and provides a potential blueprint for similar misconstruction of federal statutes, this case presents an issue of great national importance sufficient to warrant this Court's attention. Certiorari should be granted.

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[5] Such liability was imposed in, for example, *Kelley v. R. G. Industries, Inc.*, 497 A.2d 1143, 1159 (Md. 1985), where the court created a novel theory of liability under which manufacturers and sellers of "Saturday Night Special" handguns may be held "strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products."

[6] *See, e.g., Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001) (gun maker could be held liable for failing to include feasible safety devices); *Hurst v. Glock*, 684 A.2d 970 (N.J. Super. A.D. 1996) (same).

B. A Definitive Construction of the Impact of the PLCAA on Traditional State Products Liability Actions Is an Issue of Great National Importance

In attempting to parse the meaning and scope of the PLCAA, the Illinois Supreme Court felt compelled to focus entirely on the language of the product liability exception, without consideration of the Act's purposes, findings, and legislative history. The resulting confusion led the court to conclude that Congress directed all courts to dismiss state defective-design and failure-to-warn claims such as Petitioners,' even though Congress intended to preserve such actions.

In doing so, the Illinois court's approach reflected the difficulty courts throughout the nation have had when determining the meaning of federal law based on opposing statutory construction canons, which alternatively direct a focus on plain language readings of statutory terms, congressional intent as reflected by the legislative record, or readings that overcome problematic language by attempting to rend the statutory scheme "coherent and consistent," *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240 (1989), or involve the doctrine of constitutional avoidance. *See Clark v. Martinez*, 543 U.S. 371, 380-82 (2005) (stating that, in choosing between competing statutory constructions, a court should choose the construction that avoids having to decide difficult constitutional questions).

The Illinois Supreme Court opted to examine only the law's explicit terms and did not consider Congress' intent to preserve traditional products liability claims. For example, the PLCAA's first

purpose states Congress' intent was to prohibit causes of action where "the harm is *solely caused by the criminal or unlawful misuse* of firearm products . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (emphasis added). The term "solely" was specifically added after an earlier version of the statute failed in the Senate. *Compare* S. 1805, 108th Cong. § 2(b)(1) (2003), *with* 15 U.S.C. § 7901(b)(1). In the PLCAA's findings, Congress referred to "[t]he possibility of imposing liability on an entire industry for harm that is *solely caused by others* is an abuse of the legal system," again emphasizing its intent to bar liability cases only where the "sole" cause was a criminal act. 15 U.S.C. § 7901(a)(6) (emphasis added).

The Illinois Supreme Court's approach is one of two approaches that, in conflict, have been adopted by the various circuits. For example, six circuits have split over whether a provision of the Bankruptcy Code should be interpreted literally or as informed by the structure and purpose of the Code. The Fourth, Ninth, Eleventh, and Third Circuits all held that, based on the literal text of 11 U.S.C. § 365(c) (2006), debtors in possession may *not* assume a contract that grants a license without obtaining the licensor's consent, even if they do not intend to assign that contract. *See In re Sunterra Corp.*, 361 F.3d 257, 262 (4th Cir. 2004) (district court "recognized the existence of a circuit split on the issue of whether the Statute should be applied literally"). *See also In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re James Cable Partners*, 27 F.3d 534, 536-37 (11th Cir. 1994); *Matter of West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). But the First and Fifth Circuits, relying on the purpose and "relevant legislative history" of the statute,

concluded that Congress intended the law to only stop debtors in possession from assuming *and* assigning a license. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *see also In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006).

The circuits' confusion over when to rely on plain language or consider congressional intent has lead to splits as well over federal sentencing statutes. The Second Circuit relied on plain language in 18 U.S.C. § 924(c)(1)(A) (2006) to preclude the issuance of a sentencing enhancement whenever the underlying crime of violence carries a "greater minimum sentence." *United States v. Whitley*, 529 F.3d 150, 156 (2d Cir. 2008). However, the Fourth, Sixth, and Eighth Circuits construed the same statute far differently, inferring Congress' contrary intent to *increase* the length of incarcerations. *See United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Jolivette*, 257 F.3d 581, 586 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 388 (8th Cir. 2000).

A similar split has occurred over whether 8 U.S.C. § 1252(a)(2) (2006) allows judicial review of non-discretionary deportation proceedings. The Seventh Circuit recognized that the "difficulty that has given rise to this disagreement" is the divergence between the statute's plain language, that "places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review," and its purpose. *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (discussing split between Seventh and Second Circuits, and Ninth and Sixth Circuits); *see also Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151-55 (2d Cir. 2006); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006);

Santana-Albarran v. Ashcroft, 393 F.3d 699, 705 (6th Cir. 2005).

The lower courts need guidance interpreting statutes where plain language and legislative intent appear at odds. The Illinois Supreme Court's misconstruction of the PLCAA raises a particularly urgent and nationally important case resulting from this confusion, and one likely to recur nationwide.

The Illinois court reached its decision that Petitioners' case must be dismissed by relying exclusively on a purported plain language definition of an undefined statutory term – "volitional." In that court's view, a 13-year-old's playful firing of a gun he thought was unloaded, was a discharge "caused by a volitional act that constituted a criminal offense," App. 42a, and hence, preempted by the PLCAA. *Id.* Yet, for purposes of this federal statute, congressional intent properly defines what constitutes a volitional, criminal offense, not state law or consultation with a dictionary. As this Court's preemption jurisprudence makes plain, Congress' stated intent to only bar "novel" actions "solely caused" by criminal acts, 15 U.S.C. § 7901(a)(7), § 7901(b)(1), suggests that "volitional" requires some substantial degree of criminal intent, not just affirmative conduct. In fact, Congress expressed no concern for actions brought by individual victims of defective products, which it exempted from the PLCAA's immediate-dismissal requirement.

Instead, legislative history confirms that the Illinois court's interpretation is directly contrary to congressional intent. The PLCAA's chief sponsor and floor leader in the Senate stated that under the product liability section:

> [E]ven if [a] person who discharged a defective product was technically in violation of some law relating to possession of the product, that alone would not bar [a] lawsuit. For instance, if a juvenile were target shooting without written permission from his parents – that is a violation of current law, a violation of 18 U.S.C. 922(y) – and was injured by defective ammunition, the juvenile would still be able to bring a suit against the ammunition manufacturer.

151 Cong. Rec. S9087, S9100 (Sen. Craig) (July 27, 2005.

Thus, while the PLCAA's chief Senate sponsor stated that an action could be brought where a child unlawfully and intentionally pulls a trigger, under the Illinois court's reading of the PLCAA all such actions would be barred, for that court would deem the discharge a volitional act that was a criminal offense. Under that reasoning, Illinois courts could not impose liability on the manufacturer even if it made its gun with an indicator that erroneously read "UNLOADED. WILL NOT FIRE," when the opposite was true, for a child who pulled the trigger would be acting "volitionally" and unlawfully.

If this decision remains unreviewed, courts will interpret the PLCAA to intrude deeply into traditional state authority over the liability of manufacturers for defective firearms, with broad consequences for liability and compensation. In any given year more than 16,000 people in the United States are unintentionally shot, more than 3,000 of

whom are 19 or younger.[7] Researchers have found that as many as half of deaths from accidental shootings could be prevented if certain safety devices were implemented in guns.[8] Indeed, Petitioners' 13-year-old son would not have been killed had Respondent simply included a $10 safety feature invented more than a century ago. Given the dangers posed by defective guns, the applicability of the PLCAA to state products liability actions is an issue of great national importance that warrants this Court's review.

C. The Illinois Court's Approach to Construction of Key Terms in the PLCAA Conflicts with that of Other Courts

In relying on a dictionary definition of "volitional," App. 42a, the Illinois court took a tack at odds with other courts. The United States Court of Appeals for the Ninth Circuit, for example, interpreted "volitional" acts as those that intend harm. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1144-45 (9th Cir. 2001) (driving under the influence of alcohol was not a "crime of violence"

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[7] CDC National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (2006 (deaths) and 2007 (injuries), most recent year available), http://www.cdc.gov/ncipc/wisqars/. Calculations by Brady Center to Prevent Gun Violence (May 5, 2009).

[8] Jon S. Vernick *et al.*, *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJ. PREV. 307, 308 (2003). *See also* R. Ismach *et al.*, *Unintended Shootings in a Large Metropolitan Area: An Incident-Based Analysis*, 41 ANNALS OF EMERGENCY MED. 10-17 (2003); U.S. General Accounting Office, *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could be Prevented* 1-47 (1991).

under federal law, since the defendant was "without some volition to perform the act," as he did not intend to injure another).

The Illinois Supreme Court's interpretative dilemma concerning the PLCAA mirrors those of other courts faced with construing other provisions of that statute. *See e.g.*, *Ileto v. Glock Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 431 (Ind. Ct. App. 2007), *transfer denied by*, *Smith & Wesson Corp. v. City of Gary*, 2009 Ind. LEXIS 12 (Ind. Jan. 12, 2009) (table).

The constructional dilemma faced by the lower courts requires this Court's authoritative determination to resolve the conflict in the courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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APPENDIX A: Opinion of the Illinois Supreme Court (Mar. 19, 2009) 1a

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APPENDIX A
Opinion of the Illinois Supreme Court
(Mar. 19, 2009)

Supreme Court of Illinois.

Hector ADAMES, JR., et al., Appellees and Cross-Appellants,

v.

Michael F. SHEAHAN, in His Official Capacity as Cook County Sheriff, Appellant and Cross-Appellee.
Hector Adames, Jr., et al., Appellees and Cross-Appellants,

v.

Beretta U.S.A. Corporation, Appellants and Cross-Appellees.

Nos. 105789, 105851.
909 N.E.2d 742 (Ill. 2009)

March 19, 2009.
Rehearing Denied May 26, 2009.

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***745 OPINION**

Justice THOMAS delivered the judgment of the court, with opinion.

On May 5, 2001, William (Billy) Swan accidentally shot and killed his friend Joshua (Josh) Adames while playing with his father's service weapon. At the time, Billy's father, David Swan, was employed by the Cook County sheriff's department as a correctional officer. Plaintiffs, Hector Adames, Jr., and Rosalia Diaz, as co-special administrators of the estate of Josh Adames, filed suit against numerous defendants. At issue in this case are plaintiffs' claims against defendant Michael F. Sheahan (Sheahan), in his official capacity as Cook County sheriff, and defendant Beretta U.S.A. Corporation (Beretta).

Following discovery, the trial court granted summary judgment in favor of defendants Sheahan and Beretta on their respective motions for summary judgment. The appellate court affirmed in part and reversed in part, and remanded the cause. 378 Ill.App.3d 502, 316 Ill.Dec. 823, 880 N.E.2d 559. Both Sheahan and Beretta filed petitions for leave to

appeal. 210 Ill.2d R. 315(a). This court allowed both petitions and consolidated the cases. Plaintiffs also have filed a cross-appeal. 155 Ill.2d R. 318.

BACKGROUND

Numerous depositions were taken during discovery in this case. The evidence from those depositions will be summarized here as necessary to our disposition of the case.

Billy Swan's Testimony

On the morning of May 5, 2001, Billy Swan, who then was 13 years old, was home alone. Billy's mother was at work and his father, David, had taken Billy's brother to a movie. Billy called his friend Josh Adames and invited him over to play. Billy then went to his parents' bedroom to watch for Josh through the bedroom window. Billy knew that both going into his parents' bedroom and inviting friends over when no one else was home were against house rules.

While in his parents' bedroom, Billy noticed that the closet door was partially open. He saw a box on the top shelf of the closet, so he took the box down to see what was inside. Billy opened the box, which he said was unlocked, and saw three guns. One of the guns was a Beretta 92FS handgun, the gun at issue in this case. Billy had never seen his father carry a gun or clean a gun in the house, although he thought that his father might have a gun. Billy had never handled a gun before.

Billy picked up each gun and examined it. Billy said that the magazine or clip was in the Beretta. When

Billy picked up the Beretta, he pushed a button that released the magazine. Billy could see the bullets in the magazine. Billy then put the magazine back in the Beretta. Billy moved the slide at the top of the gun and a bullet popped out. Billy again removed the magazine and put the bullet back in the magazine. Billy repeatedly removed and replaced the bullets and magazine from the gun. Billy knew that the Beretta was loaded when the magazine was in the gun, but thought it was unloaded when the magazine was taken out. He thought that the bullet came out of the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber. Billy did not read the instruction manual for the Beretta.

After playing with the guns for several minutes, Billy saw his friend Michael riding his bike outside. Billy put the three guns in his pockets and went downstairs and opened the front door. Billy invited Michael in and showed him the guns. Billy jokingly told Michael that he was feeling ***746** "trigger happy" and that he was going to shoot Josh. Billy left the guns on the couch while he and Michael went in another room to play on the computer. Approximately 10 minutes later, Josh came over. Billy showed Josh the guns and the boys began playing around. While Billy was holding the Beretta, Josh tried to reach for it to take it out of Billy's hand. Billy pushed the button on the Beretta, took the magazine out and put it in his pocket. At this point, Josh was by the front door. Billy pretended that he was firing the gun, then pulled the trigger, discharging the gun. The gunshot was loud, causing Billy's ears to ring. Billy was afraid he would be in trouble if the neighbors heard the noise, so he ran upstairs and put the guns away.

When Billy came back downstairs, he saw Josh sitting against the door holding his stomach. Josh told Billy that he had been shot. Billy first thought that Josh was kidding, but when he moved Josh's hand, he saw a hole. Billy called 911 and told the dispatcher that he had found a gun and accidentally shot his friend while playing. Billy testified that he knew he was handling a real firearm and real ammunition when he shot Josh. Michael left as soon as the shooting happened.

Billy was found delinquent in juvenile court proceedings for the shooting and was placed on probation. The delinquency determination was based on a finding that Billy committed involuntary manslaughter (720 ILCS 5/9-3(a) (West 2000)), and reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2000)). The appellate court affirmed the delinquency finding. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23).

David Swan's Testimony

David Swan graduated from the police academy in 1988 and was deputized with the Cook County sheriff's department around January 1988. From 1988 through 1997 or 1998, David worked corrections inside the Cook County jail, working a tier with approximately 48 to 60 inmates. David fed the inmates and did paper work and log books. David was promoted to a lieutenant in 1997 or 1998. As lieutenant, David's position was mainly administrative, doing paper work and scheduling and filling shifts. Until David was promoted to lieutenant, he carried a firearm to and from work most of the time, although he did not carry his gun while working on the jail tier.

Rather, he would store his gun in the Division 5 Armory. He initially carried a Smith & Wesson .38 Special, but when he became certified in automatic weaponry, he began carrying the Beretta 92FS and kept the .38 Special as his personal weapon. David stopped carrying a weapon to work when he became a lieutenant. David testified that in 2001, he did not need a weapon in order to perform his job duties.

At the time of the shooting, David owned three firearms, the .38 Special, a .25 semiautomatic and the Beretta 92FS. The .25 semiautomatic was David's personal weapon and was never carried on the job. Although David no longer carried a gun once he was promoted to lieutenant, David kept his guns for his own protection and in case he was transferred to a different unit of the Cook County sheriff's office where he would again need a firearm. David's understanding was that, as a correctional officer, he was not required to respond to a crime by attempting to physically introduce himself into the crime or stop the crime. Rather, David understood that he was to call "911" to request a police response ***747** in the event he witnessed criminal activity.

On May 5, 2001, David took his younger son to the movies while his wife was at work. Billy did not want to go to the movie. David told Billy that no one was allowed in the house. Billy said that he was going to the park to play. David testified that prior to May 5, 2001, the last time he had seen his guns was in the summer of 2000, when he completed his annual certification at the Cook County sheriff's gun range. After qualifying with the weapons, David cleaned them and locked them in his lockbox. David placed the lockbox with the guns in it on the top shelf of his bedroom closet. There were two keys to the lockbox.

David kept one key on his key ring and one key in his top dresser drawer. David disagreed with Billy's testimony that the lockbox was not locked; however, for purposes of summary judgment, it was presumed that the lockbox was unlocked.

David understood that the sheriff's department required deputies to secure and store their weapons in either a locking box, like the one David used, or with a trigger lock. David testified that he stored the ammunition separately from the handgun, and stored the handgun without a bullet in its chamber, in accordance with department requirements. David was not aware that the Beretta would fire a bullet if the magazine was removed.

Following the shooting, Sheahan filed a complaint against David before the Cook County sheriff's merit board. The complaint alleged that each officer has a duty to safely store his weapon, that David did not do that, and that this failure allowed David's son to gain access to the weapon, which in turn resulted in Josh's death. The complaint noted that Sheahan's general order required the safe storage of weapons to avoid accidents. David's guns were taken from him by the police in the investigation and were never returned to him, although David was able to continue to work for the Cook County sheriff's office as a correctional officer after serving a suspension.

David also was charged pursuant to section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2000)), which prohibits improper storage of a firearm in a premise in which a minor under the age of 14 is likely to gain access to the firearm. David was found not guilty of the criminal charges.

Sheahan's Office Rules and Policies

Sheahan's executive director and weapons training officers testified concerning Sheahan's orders and training instructions. Those orders and training instructions required all weapons to be locked up when stored at home. Weapons must be stored so they are inaccessible to children, and officers are taught to expect their children to look everywhere in their homes. At the time of Josh's shooting, Sheahan had a general order in place that mirrored or exceeded the requirements of section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2000)). The general order required officers to secure their duty weapons in a secured lockbox container or other location that would prohibit access by unauthorized persons, and to store keys to such lockboxes in a separate secure location. Sheahan's training also included materials on educating family members, particularly children, about gun safety. Officers are required to qualify in firearms annually, even if they do not own a weapon. Recertification included a program on home firearm safety.

Gerald O'Sullivan, retired executive director of the Cook County sheriff's office's training program, testified that Cook County Sheriff's Office correctional officers do not need a weapon to perform *748 their duties. O'Sullivan said that only court deputies and sheriff's police officers need a weapon. The only authorized purpose for a correctional officer's duty firearm would be for external operations outside the jails. All sheriff's deputies receive training to use their firearms, but it is a police officer that responds to an emergency on the street. Cook County sheriff's correctional officers are trained that unless someone's life is in danger, they are to call "911." Correc-

tional officers never carry their duty weapons when they are at the jails, and do not have the responsibility to be ready to use their firearm to protect a person's life if it is in danger.

Similarly, Cook County sheriff's office retired Training Academy Chief Michael Ryan testified that correctional officers are not required to carry their weapons when they are off duty. Correctional officers are trained to call "911" and not to get involved in criminal situations, although Ryan testified that officers do have a duty to respond to forcible felonies occurring in their presence while off duty. In such a situation, a correctional officer would be permitted to use his duty firearm. Ryan further testified that when a correctional officer is at home, he is not expected to respond to crimes and is not required to keep his weapon available to him at all times when he is off duty. In fact, correctional officers are not required to own weapons.

Leroy Marcianik, range master of the firearms training division of the Cook County sheriff's department, testified that all sworn officers in Sheahan's office are required to be recertified in firearms on an annual basis. The officers are required to have a firearm that they can use in their annual recertification process. The process of recertification includes instruction on shooting, as well as issues concerning the safe storage of duty firearms. Officers that carry their firearms on a daily basis include the sheriff's police and some of the court services officers. Sheriff's correctional officers do not have to carry a weapon while on duty, nor do they have to carry a weapon when off duty.

The Beretta 92FS

The Beretta 92FS is a semiautomatic nine-millimeter pistol. The instruction manual for the Beretta states that "[t]he Beretta 92FS semiautomatic pistol is primarily designed as a personal defense firearm for military and police use," and that "[i]t has become the choice of military and police forces throughout the world." The manual lists the Beretta's safety features, including: an ambidextrous safety-decocking lever; a firing pin unit; a hammer drop catch; an automatic firing pin catch; a chamber-loaded indicator, and a slide overtravel stop. The manual repeatedly cautions users to keep fingers off the trigger until ready to fire and to make sure the muzzle is pointing in a safe direction. The manual also warns that to prevent accidents due to wrongful unloading practice, the user should remember to remove the magazine and clear the chamber.

Expert Testimony

Plaintiffs presented experts in their case against Beretta to testify that the Beretta 92FS was unreasonably dangerous. Stanton Berg, a firearms consultant, testified that a magazine disconnect device would have prevented the shooting in this case. The magazine disconnect was invented in 1910 and disables a semiautomatic pistol from firing when the magazine is removed. Berg testified that Beretta produced and sold Beretta 92 Series handguns with a magazine disconnect for use by police departments such as the Royal Canadian Mounted Police, the United States Veterans Administration and the correctional department of New York City. Berg noted *749 more than 300 other models of handguns that incorporate a magazine disconnect safety, and testi-

fied that, in his opinion, any handgun without a magazine disconnect is defective. In addition, Berg testified that, in the absence of a magazine disconnect, the Beretta required a good chamber-loaded indicator. Berg said that the chamber-loaded indicator on the Beretta 92FS was not sufficient to warn a user that the chamber had a bullet in it because the user could hardly see the indicator. Berg also believed that the Beretta required a warning on the weapon stating that it was capable of being fired with the magazine removed.

Wallace Collins, a firearms and ammunition design and safety expert, also testified on behalf of plaintiffs that the Beretta was unnecessarily dangerous. Collins stated that the Beretta required a magazine disconnect safety; a warning that the gun would fire when the magazine was removed; a marking to make plain what the chamber-loaded indicator means; a chamber-loaded indicator in an optimum position; and a key lock. Collins testified that the chamber-loaded indicator on the Beretta was not well designed. Collins said that the safety features required were readily available, inexpensive, and commercially feasible.

Professor Stephen Teret testified on behalf of plaintiffs as an expert in injury epidemiology. Teret was a professor of epidemiology for the School of Public Health at Johns Hopkins University. Teret testified concerning a survey designed by the Johns Hopkins Center for Gun Policy and Research, reported in the Journal of Public Health Policy. The survey asked respondents whether they thought that a pistol can be shot when the magazine is removed. Out of 1,200 respondents, 65% said that the pistol could be fired if the magazine was removed, 20.3% thought that a

pistol could not be discharged after the magazine was removed, 14.5% did not know, and 0.2% refused to answer. Of those that answered either that the pistol could not be discharged after the magazine was removed or that they did not know, 28% lived in a gun-owning household. Teret testified that the absence of a magazine disconnect caused Josh's shooting. Teret further testified that the chamber-loaded warning on the Beretta was not effective. Teret's opinion was that the chamber-loaded warning did not convey that the handgun was loaded.

Beretta's witnesses testified that Beretta has manufactured handguns with magazine disconnects, which adds at most $10 to the $500 price of the gun. Beretta's witnesses agreed that the shooting in this case would not have happened if a magazine disconnect safety had been installed on the gun. Beretta did not include a magazine disconnect safety feature on the Beretta 92FS because there was no market demand for that feature. Beretta's witnesses also testified that for the past 20 years, the vast majority of law enforcement agencies have consistently expressed a preference for no magazine disconnect safety or internal locking device. Law enforcement officers and agencies do not want weapons that may become inoperable by an inadvertent release of the magazine, which could possibly jeopardize the safety of officers and the public.

The Complaint and Summary Judgment

With regard to Sheahan, plaintiffs' third amended complaint contained a wrongful-death claim and a survival claim. Plaintiffs alleged that Sheahan assumed and exercised control over David Swan as Sheahan's employee and servant with regard to the

safe and secure handling and storage of David's duty firearm and ammunition. Plaintiffs alleged, *inter alia,* that David Swan negligently stored his firearm, *750 as well as his ammunition, in a manner that allowed his 13-year-old son to gain access to it; negligently failed to store his firearm in a separate location from the ammunition; negligently failed to childproof the firearm by securing it with a locking device; negligently failed to lock the container in which he stored his firearms; and negligently provided insufficient, as well as inappropriate, firearm instruction to Billy.

Plaintiffs alleged that, as a result of one or more of David's negligent acts, Billy accessed David's firearm and bullets, and used the firearm to shoot and kill Josh. In addition, the wrongful death of Josh was proximately caused by David's negligence in the course of his employment as a deputy Cook County sheriff, while motivated to serve Sheahan's interests and the terms of David's employment. Plaintiffs asserted that Sheahan was vicariously liable for David's negligent acts and/or omissions in the scope of his employment as an officer of the Cook County sheriff's office, both at common law and pursuant to statute.

Sheahan moved for summary judgment on the ground that the shooting did not occur within the course and scope of David's employment as a Department of Corrections officer, that Sheahan owed no duty to Josh, and that the storage of the gun was at most a condition and not the cause of the shooting. In the alternative, Sheahan argued that if the court determined that David's storage of the gun was within the course and scope of David's employment, Sheahan was immune from suit pursuant to sections

2-109, 2-201, and 2-204 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-109, 2-201, 2-204 (West 2000)).

In addressing Sheahan's motion for summary judgment, the trial court held that Sheahan's arguments concerning weapon storage and scope of employment presented questions of fact sufficient to preclude summary judgment. However, the trial court found that the issue of whether Sheahan owed a duty to protect Josh from the criminal acts of Billy was dispositive. The trial court noted that Billy had been convicted of involuntary manslaughter and reckless discharge of a firearm, and had been adjudicated a delinquent minor. Citing *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill.2d 496, 117 Ill.Dec. 47, 520 N.E.2d 37 (1988), the trial court noted that Illinois law does not impose a duty to protect another from a criminal attack by a third person unless the criminal attack is reasonably foreseeable and the parties have a special relationship. The trial court held that Sheahan and Josh had no special relationship that would impose a duty on Sheahan to protect Josh from Billy's criminal act. The trial court further held that even if Sheahan, through his agent David Swan, owed a duty to Josh, there was no proximate cause because the cause of harm to Josh was not reasonably foreseeable. The trial court therefore entered summary judgment in favor of Sheahan.

With regard to Beretta, plaintiffs' third amended complaint contained claims for product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. Specifically, plaintiffs alleged that the Beretta was inherently dangerous and defective because it did not incorporate safety features, including: a magazine

disconnect safety that would prevent the gun from being fired if the magazine is removed; an effective chamber-loaded indicator to make users aware of when a bullet is loaded into the gun's chamber; and other safety devices such as a built-in lock, a child-resistant manual safety, a grip safety, and personalized*751 gun technology that would have prevented unauthorized users, such as children, from firing the gun.

Plaintiffs also alleged that the gun was defective because it did not include adequate warnings concerning the foreseeable use of the gun by unauthorized persons, including children. Plaintiffs asserted that the defects included a failure to warn that: the gun may be loaded and can be fired even if the magazine is empty or disconnected from the gun; that the gun is loaded when there is red showing on the extractor; that the gun is loaded when the extractor is protruding; that the gun can be fired by children and other unauthorized users; that the gun automatically loads bullet cartridges into the gun's chamber after being fired or after the gun is released from a lockback position; and that the gun should not be used or stored without additional safety devices.

In its summary judgment motion, Beretta argued that its product was not unreasonably dangerous, and that the Beretta 92FS performed as safely as ordinary consumers of firearms would expect. Beretta also argued that it had no duty to warn because the dangers of pointing a firearm at another human being and pulling the trigger are open and obvious. Finally, Beretta contended that Billy's actions were an intervening and superceding cause.

The trial court granted Beretta's motion in its en-

tirety, "based upon the record" and "for all the reasons stated by Defendant Beretta and all relevant law."

The Appellate Court

Plaintiffs then appealed the trial court's orders. The appellate court affirmed in part and reversed in part. 378 Ill.App.3d 502, 316 Ill.Dec. 823, 880 N.E.2d 559. With regard to Sheahan, plaintiffs argued that the trial court erred in finding that Sheahan owed no duty to Josh, and in finding that Billy's conduct was criminal and was an independent intervening cause of Josh's injury. Plaintiffs argued that because the trial court relied on its finding that Billy's actions were criminal, it failed to examine the proper factors to determine whether one party owes a duty to another. Plaintiffs further argued that the trial court erred in finding that a criminal attack even occurred, as the testimony established that the shooting was an accident.

In addressing plaintiffs' arguments, the appellate court stated that because plaintiffs sought damages against Sheahan based on the principle of *respondeat superior*, it would address scope of employment, even though the trial court denied Sheahan's motion on that issue. 378 Ill.App.3d at 515, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court found that the facts in this case were similar to the facts in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41, 236 Ill.Dec. 40, 706 N.E.2d 914 (1998), so that *Gaffney* was controlling. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. Based upon *Gaffney*, the appellate court found that the facts supported a finding that David was acting within the scope of his employment, and that Sheahan was liable for David's allegedly tor-

tious acts. 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court next considered whether Billy's actions foreclosed a duty on the part of Sheahan to Josh. The appellate court took issue with the trial court's characterization of the proceedings against Billy as a conviction. The appellate court noted that Billy was adjudicated delinquent pursuant to the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2000)) and that a juvenile adjudication is not a "conviction" as defined under the Criminal Code of 1961 (720 ILCS 5/2-5 (West 2000)). 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559. Therefore, ***752** Billy was not convicted of a crime. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. Further, because Billy did not intend to hurt Josh, there was a question of material fact of whether Billy's actions were accidental or reckless. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. Accordingly, the appellate court held that the trial court erred in finding that Billy's actions were a criminal attack that foreclosed Sheahan's duty to Josh. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court also disagreed with the trial court's finding that this incident was not reasonably foreseeable for purposes of summary judgment. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. The court based its finding on the fact that David stored his Beretta next to ammunition in an unlocked storage case, in an unlocked closet accessible to a 13-year-old boy. The court also noted the evidence concerning Sheahan's awareness of these types of incidents. Moreover, there was sufficient evidence in the record to establish the additional duty factors

of the likelihood of injury, the magnitude of the burden to guard against the injury, or the consequences of imposing that burden. 378 Ill.App.3d at 520, 316 Ill.Dec. 823, 880 N.E.2d 559.

Finally, the appellate court noted that Sheahan had raised sections 2-109, 2-201 and 2-204 of the Tort Immunity Act (745 ILCS 10/2-109, 2-201, 2-204 (West 2000)) as affirmative defenses to the complaint. The appellate court noted that the trial court did not address the tort immunity issue, and in remanding, stated that its finding that Sheahan was liable under the doctrine of *respondeat superior* did not end the immunity analysis, as the existence of a duty and the existence of an immunity are distinct issues that must be analyzed separately. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559.

With regard to Beretta, the appellate court similarly held that the trial court erred in finding that Billy's actions were an independent intervening cause that superseded Beretta's legal responsibility. 378 Ill.App.3d at 523, 316 Ill.Dec. 823, 880 N.E.2d 559. Rather, proximate cause in fact was shown because the shooting would not have occurred if the handgun had been properly stored, and it was reasonably foreseeable that this type of harm would occur if the handgun was not properly stored. 378 Ill.App.3d at 523, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court did affirm the trial court's finding that the Beretta was not unreasonably dangerous or defectively designed under both the consumer expectation test and the risk-utility test for product liability claims. 378 Ill.App.3d at 526, 528, 316 Ill.Dec. 823, 880 N.E.2d 559. However, the appellate court reversed the trial court's finding that Beretta did not have a duty to warn. The appellate court held that

plaintiffs' failure to warn claim presented a question of fact sufficient to survive summary judgment. 378 Ill.App.3d at 530, 316 Ill.Dec. 823, 880 N.E.2d 559.

Finally, the appellate court addressed Beretta's argument that plaintiffs' lawsuit against it should be dismissed pursuant to the recently enacted Protection of Lawful Commerce in Arms Act (PLCAA or the Act) (15 U.S.C. §§ 7901 through 7903 (2006)). The appellate court noted that, pursuant to the PLCAA, plaintiffs must show that they fall within the exceptions to the Act in order to avoid its provisions. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court held that plaintiffs failed to show that their claims fell within the PLCAA's exceptions for negligent entrustment or negligence *per se*, and for breach of contract or warranty. ***753**378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court held that the only exception that applied in this case is the exception for claims alleging a defect in design or manufacturing, absent a volitional criminal act. 378 Ill.App.3d at 533-34, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court stated that whether Billy's actions were criminal or unlawful was a question of fact for the trier of fact. If Billy's actions were found to be criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. However, if Billy's actions were found to be purely accidental, the section 7903(5)(A)(v) exception to the PLCAA would apply and the PLCAA would not preclude plaintiffs' claims against Beretta. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559.

ANALYSIS

This case comes before us on the grant of summary judgment in favor of defendants. The purpose of

summary judgment is to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 42-43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004). Summary judgment is proper only where "the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2000). In determining whether a genuine issue of material fact exists, the pleadings, depositions, admissions and affidavits must be construed strictly against the movant and liberally in favor of the opponent. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. This court reviews an order granting summary judgment *de novo*. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248.

Sheahan's Appeal

Sheahan argues that the trial court properly granted summary judgment in his favor because he had no duty to protect Josh from a criminal attack. Sheahan contends that no special relationship existed between Sheahan and Josh that would give rise to a common law duty to warn or protect Josh from harm. Moreover, Sheahan did not voluntarily undertake to pro-

tect Josh from third-party criminal attacks, which would fit within the exception to the special relationship rule.

Sheahan also argues that the appellate court's decision extends *respondeat superior* liability to unreasonable and impermissible bounds. Sheahan maintains that David was not acting within the scope of his employment at the time that he stored the Beretta.

Finally, Sheahan argues that summary judgment in his favor also is warranted because the manner in which David's Beretta was stored was not the proximate cause of Josh's shooting. Rather, the manner in which the Beretta was stored merely furnished a condition that made the shooting possible.

In response, plaintiffs deny that their claim involves special relationships or preventing criminal attacks. In fact, plaintiffs argue that there was no criminal attack in this case, because Billy did not intend to *754 shoot or harm anyone, and was not convicted of a criminal offense, but was only adjudicated delinquent. Plaintiffs also deny that they alleged a voluntary undertaking. Rather, plaintiffs' allegations of duty are premised on common law and statutory grounds. Plaintiffs claim that Sheahan owed a duty under common law and statute to secure the handgun. Further, plaintiffs contend that the shooting in this case was foreseeable.

With regard to *respondeat superior*, plaintiffs argue that the issue is not properly before this court because it was not an issue in the appellate court. Although the appellate court addressed scope of employment, plaintiffs assert that because scope of em-

ployment was not at issue, that portion of the opinion was *dicta.* Assuming, *arguendo,* the issue is properly before this court, plaintiffs contend that David was acting within the scope of his employment. Plaintiffs note that Sheahan required David to keep his weapon secured at home, which demonstrates that Sheahan controlled David's use of the Beretta during off-duty hours. Further, Sheahan could regulate David's storage of the weapon only if David was acting within the scope of his employment. In addition, the fact that Sheahan filed charges against David before the Cook County sheriff's merit board, alleging a violation of the sheriff's rules concerning weapon storage, establishes that David was acting within the scope of his employment. Plaintiffs maintain that Sheahan would have no authority to discipline David if David was not acting in the scope of his employment.

We first address plaintiffs' claim that the issue of *respondeat superior* is not properly before this court. It is well settled that when the appellate court reverses the trial court, and the appellee in the appellate court brings the case to this court for further review, that party may raise any questions properly presented by the record to sustain the judgment of the trial court, even if those questions were not raised or argued in the appellate court. *In re R.L.S.*, 218 Ill.2d 428, 437, 300 Ill.Dec. 350, 844 N.E.2d 22 (2006). In Sheahan's motion for summary judgment in the trial court, in addition to raising arguments concerning duty, proximate cause and tort immunity, Sheahan argued that he was entitled to summary judgment because the shooting did not occur within the course and scope of David's employment. As noted, the trial court granted summary judgment in favor of Sheahan based on its finding that Sheahan owed no duty

to Josh. Plaintiffs then appealed that finding. In addressing the trial court's finding that Sheahan owed no duty to Josh, the appellate court addressed the issue of *respondeat superior*. Sheahan then raised the issue of *respondeat superior* in his petition for leave to appeal and brief in this court. Accordingly, it is clear that the issue of *respondeat superior* is properly before this court.

We next address the merits of the appellate court's finding that David was acting within the scope of his employment when he stored his weapon, as a finding that David was not acting within the scope of his employment would be dispositive. In general, a person injured by the negligence of another must seek his remedy from the person who caused his injury. *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007). However, the relationship of employer and employee sets forth an exception to the general rule. *Bagent*, 224 Ill.2d at 163, 308 Ill.Dec. 782, 862 N.E.2d 985. Pursuant to the theory of *respondeat superior*, an employer can be liable for the torts of his employee when those torts are committed within the scope of the employment. ***755***Bagent*, 224 Ill.2d at 163, 308 Ill.Dec. 782, 862 N.E.2d 985. Under *respondeat superior*, an employer's vicarious liability extends to the negligent, willful, malicious or even criminal acts of its employees, when those acts are committed within the scope of employment. *Bagent*, 224 Ill.2d at 163-64, 308 Ill.Dec. 782, 862 N.E.2d 985.

Illinois courts look to the Second Restatement of Agency (the Restatement) for guidance in determining whether an employee's acts are within the scope of employment. *Bagent*, 224 Ill.2d at 164, 308 Ill.Dec. 782, 862 N.E.2d 985. The Restatement identifies

three general criteria used in determining whether an employee's acts are within the scope of employment. The Restatement provides:

> "(1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master* * *[.]
>
> * * *
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1958).

This court has held that all three criteria of section 228 must be met in order to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. It is plaintiff's burden to show the contemporaneous relationship between the tortious act and the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985.

With regard to the scope of employment issue, the appellate court held that this case was controlled by its decision in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41, 236 Ill.Dec. 40, 706 N.E.2d 914 (1998),

and, therefore, that David was acting within the scope of his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. In *Gaffney*, a patrolman employed by the Chicago police department came home from work, unloaded his revolver, and placed the revolver and the bullets in an unlocked metal cabinet near the stairway leading to his basement. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. The officer's minor son later took the revolver and bullets to a party, and shot and killed a boy. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. The plaintiff sued the officer for negligent storage of his weapon, and sued the City of Chicago under a *respondeat superior* theory. *Gaffney*, 302 Ill.App.3d at 43, 236 Ill.Dec. 40, 706 N.E.2d 914. A jury found both defendants liable, and in answer to a special interrogatory, found that the officer was acting within the scope of his employment when he stored the weapon. *Gaffney*, 302 Ill.App.3d at 43, 236 Ill.Dec. 40, 706 N.E.2d 914. The circuit court granted the City's motion for judgment notwithstanding the verdict on the ground that the officer was not acting within the scope of his employment at the time he stored the gun at his home. *Gaffney*, 302 Ill.App.3d at 43-44, 236 Ill.Dec. 40, 706 N.E.2d 914.

On appeal, the appellate court reversed. The appellate court noted that the officer had testified that he was required to own a gun; that he would not be allowed to report for work if he did not have a gun; and that he brought his guns and bullets home every day because the police department did not provide him with a locker in which to store his weapon at work. ***756***Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914. The officer also testified that he did not lock the cabinet or the gun because his life had been threatened several times and " 'because I'm a

Chicago police officer. If I heard someone screaming, would I have time to get that gun, I don't know. Would I attempt to, hopefully.' " *Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914. In addition, the officer stated that as a Chicago police officer, he was required to respond to emergencies at all times, even if not on duty, and that he sometimes might need a gun to respond effectively to an emergency if he had it readily available. *Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914.

With regard to the three criteria set forth in the Restatement, the appellate court held that the officer's storage of the gun at home was incidental to the requirement of his employment that he respond to any emergency that occurs in his presence. *Gaffney*, 302 Ill.App.3d at 51, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court acknowledged that normally at-home storage of one's personal effects would likely be considered an act of a personal nature, but in this case the police department both trained its officers in off-duty weapon storage and could discipline officers for improper safeguarding of weapons while off duty. *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914.

The appellate court next held that the officer's conduct occurred substantially within the authorized time and space limits of the employment, although the appellate court also concluded that "the fact that conduct occurred outside the time and space limits is not dispositive." *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court recognized that the officer was off duty when he stored his weapon, but noted that with respect to emergencies, the officer was "on call" 24 hours a day. *Gaffney*, 302 Ill.App.3d at 53, 236 Ill.Dec. 40, 706 N.E.2d 914.

Therefore, it was not unreasonable to conclude that the time and space of the officer's employment [illegible] unlimited with respect to actions incidental to his response to an emergency. *Gaffney*, 302 Ill.App.3d at 53, 236 Ill.Dec. 40, 706 N.E.2d 914.

Finally, the appellate court held that the officer's conduct was motivated, at least in part, by a desire to serve his employer. The appellate court based its finding on the fact that one of the reasons the officer kept the gun and cabinet unlocked was because he might need it in the event of an emergency. *Gaffney*, 302 Ill.App.3d at 54, 236 Ill.Dec. 40, 706 N.E.2d 914. Further, the fact that the officer stored the gun in contravention of the police department's recommendations did not establish that the storage was outside the scope of employment. *Gaffney*, 302 Ill.App.3d at 55, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court therefore held that the officer was acting within the scope of his employment when he stored his gun.

Relying on *Gaffney*, the appellate court in this case held that David's storage of the gun was incidental to his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that officers stored their weapons at home and received specific training and materials on proper storage. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. In addition, Sheahan disciplined officers for improper storage. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court acknowledged that David did not carry his weapon to work daily, nor did he store it unlocked in order to respond to any emergency in his presence. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. Nonetheless David testified he owned the firearm because of his

job *757 and was annually certified to use the firearm, as required by Sheahan. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court also held that David was acting within the authorized time and space limits of his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that officers were expected to store their weapons at home and, although David testified that he did not carry his gun to work, he did testify that, at one time, he owned the gun for work purposes. 378 Ill.App.3d at 517-18, 316 Ill.Dec. 823, 880 N.E.2d 559. In addition, David would be required to use the gun in an emergency, was certified annually to use the firearm, and was disciplined by Sheahan for improper storage. 378 Ill.App.3d at 517-18, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court did not discuss whether David's conduct was motivated, at least in part, by a desire to serve his employer. The appellate court concluded that David was acting within the scope of his employment and that Sheahan was liable for David's alleged tortious acts. 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559.

At the outset we note that the appellate court erred in not addressing whether David's conduct was motivated, at least in part, by a desire to serve his employer. As noted, this court in *Bagent* held that all three criteria must be met to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. For the same reason, we find that the appellate court in *Gaffney* erred in holding that the second criteria-whether the conduct occurred substantially within the authorized time and space limits of the employment-was relevant but not disposi-

tive. See *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914 ("the fact that conduct occurred outside the time and space limits is not dispositive"). We again emphasize that all three criteria of section 228 must be met in order to find that an employee was acting within the scope of employment.

Turning to the substance of the appellate court's ruling, we find that the appellate court erred in finding that David was acting within the scope of his employment and that Sheahan is liable for David's tortious acts. Contrary to the appellate court's conclusion, this case is factually distinguishable from *Gaffney*.

In contrast to *Gaffney*, David testified that he was not required to own a gun and did not need to carry a gun to work once he was promoted to lieutenant in 1997 or 1998. David testified that he did not get rid of his guns, even though he did not carry a weapon in performing his duties, because he wanted the guns for protection and in case he was transferred to a different position where he would need a weapon. In fact, the last time David had seen or touched the Beretta prior to the May 5, 2001, shooting was in the summer of 2000, when David did his yearly qualification with the sheriff's department at the firing range. David also testified that when he was off duty, he was not required to respond to a crime by attempting to stop the crime himself. Rather, his duty was to call 911 and report the crime to the proper authorities.

Gerald O'Sullivan, Michael Ryan and Leroy Marcianik confirmed that correctional officers are not required to carry a weapon when they are off duty, and in fact do not need a weapon to perform

their duties. Correctional officers also are not required to respond to emergencies when they are off duty, and are not required to keep their weapons available at all times.

Based on the preceding testimony, we find as a matter of law that none of the *758 three general criteria for determining whether an employee's acts are within the scope of employment have been met in this case. With regard to the first criteria, David's negligent storage of his guns was not the kind of conduct David was employed to perform, nor was it incidental to his employment. The appellate court found David's negligent storage of the gun was incidental to his employment because there was testimony that officers stored their guns at home, Sheahan trained officers on proper storage, and Sheahan disciplined officers for improper storage. While these facts might support a finding that David was acting within the scope of his employment if David was required to carry a gun at work like the officer in *Gaffney*, the fact remains that at the time Billy shot Josh, David was not required to, and did not, carry a gun as part of his employment.

The appellate court also found significant David's testimony that he owned the weapon because of his job and that he was annually certified to use the firearm pursuant to Sheahan's requirements. David testified, however, that Cook County sheriff's officers were required to annually qualify with firearms even if they do not own a weapon. Moreover, while it is true that David purchased the Beretta in connection with his job, the Beretta was purchased at a time when David carried a gun back and forth to work every day. David stopped carrying a gun to work when he became a lieutenant in 1997 or 1998. At

that point, David was not required to keep the Beretta for purposes of his employment, but chose to do so. Contrary to the appellate court's finding, none of these facts establish that David's negligent storage of his weapon was in the performance of his employment or incidental to his employment.

For the same reasons, David's negligent storage of the gun was not within the authorized time and space limits of his employment. Unlike the police officer in *Gaffney*, David was not on call 24 hours a day, was not required to respond to emergencies at all times, and was not required to respond to a crime by attempting to stop the crime himself. In contrast to *Gaffney*, David's employment was not unlimited with respect to actions incidental to his response to an emergency. Consequently, even under the most liberal interpretation of the time and space requirement, it is clear that David's negligent storage of the gun in this case was not within the scope of his employment.

Similarly, there is no evidence that David was motivated, at least in part, by a desire to serve his employer when he negligently stored his gun. As noted, the appellate court in this case did not address this factor in its *respondeat superior* analysis. *Gaffney* held that the officer's conduct in negligently storing his weapon was motivated, at least in part, by a desire to serve his employer, because one of the reasons the officer kept the gun and cabinet unlocked was because he might need it in the event of an emergency. *Gaffney*, 302 Ill.App.3d at 54, 236 Ill.Dec. 40, 706 N.E.2d 914. *Gaffney* acknowledged that the officer also testified that he kept the gun and cabinet unlocked in order to protect his family, but noted that the third criteria in the *respondeat superior*

analysis is satisfied as long as the employee is motivated in part by a desire to serve the employee, even if he is also motivated by personal considerations.

Here, in contrast, there was no evidence that David's negligent storage of the gun was motivated, at least in part, by a desire to serve Sheahan. As discussed, David did not keep the Beretta unlocked in order to respond to an emergency. David kept the Beretta, and thus stored the Beretta, for ***759** his own protection and in case he needed it in the future.

Although summary judgment is generally inappropriate when scope of employment is at issue, if no reasonable person could conclude from the evidence that an employee is acting within the course of employment, a court should hold as a matter of law that the employee was not so acting. *Bagent*, 224 Ill.2d at 170-71, 308 Ill.Dec. 782, 862 N.E.2d 985. Here, no reasonable person could conclude from the evidence that David was acting within the scope of his employment when he negligently stored his weapon. Consequently, Sheahan was entitled to summary judgment in his favor on the issue of *respondeat superior*. The appellate court erred in finding that David was acting within the scope of employment and that Sheahan was thereby liable for David's allegedly tortious acts.

Because we find that Sheahan was entitled to summary judgment based upon *respondeat superior*, there is no need to address Sheahan's remaining arguments concerning duty and proximate cause, nor do we need to remand to the trial court for consideration of Sheahan's immunity claims.

Beretta's Appeal

Plaintiffs' claim against Beretta contained counts alleging design defect, failure to warn, and breach of the implied warranty of merchantability. As noted, the trial court granted summary judgment in favor of Beretta on all of plaintiffs' claims. Plaintiffs appealed the dismissal of their design defect and failure to warn claims, arguing that the trial court erred in holding that the handgun was not unreasonably dangerous for failing to include a magazine disconnect, or a sufficient chamber-loaded indicator, and in finding that Beretta had no duty to warn. Plaintiffs also asserted that the trial court erred in finding that Billy's conduct was an independent intervening cause superceding Beretta's legal responsibility.

As noted, the appellate court affirmed in part and reversed in part. The appellate court affirmed the trial court's finding that the Beretta was not unreasonably dangerous or defectively designed. However, the appellate court did find that plaintiffs' failure to warn claim presented a question of fact, so that summary judgment was improperly entered in favor of Beretta on that claim.

The appellate court also addressed whether the PLCAA required dismissal of plaintiffs' lawsuit against Beretta. The PLCAA was enacted on October 26, 2005, two months after the trial court entered summary judgment in favor of defendants, and applied retroactively to prohibit civil suits against manufacturers, importers, distributors, and dealers of firearms or ammunition products, for harms solely caused by the criminal or unlawful misuse of firearm products or ammunition products that function properly as designed and intended. See 15 U.S.C. §§

7901(a)(3), (b)(1), 7902 (2006). The appellate court held that the PLCAA applied to plaintiffs' lawsuit against Beretta, and therefore plaintiffs' cause of action was barred unless the remaining failure to warn claim fit within one of the Act's six exceptions. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court found that there was a question of fact concerning whether plaintiffs' failure to warn claim fit within the section 7903(5)(A)(v) exception. That exception allows for claims alleging a defect in design or manufacturing absent a volitional criminal act. In so holding, the appellate court rejected plaintiffs' claim that the PLCAA was unconstitutional because it violated the tenth amendment to the United States Constitution (*760U.S. Const., amend. X). 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

In this court, Beretta argues that the appellate court erred in finding that Beretta had a duty to warn. Beretta contends that the danger of pointing a gun at another person and pulling the trigger is open and obvious, even if the person pointing the gun mistakenly believes that the gun is not loaded. In addition, the appellate court ignored the fact that Beretta did provide numerous warnings, any one of which would have prevented Josh's shooting if read and heeded. Beretta also argues that the appellate court erred in holding that plaintiffs' failure to warn claim fit within the exception for manufacturing and design defect claims set forth in the PLCAA.

We first address Beretta's claim that the PLCAA bars plaintiffs' sole remaining claim against Beretta. Whether plaintiffs' failure to warn claim is barred by the PLCAA presents a question of statutory interpre-

tation, which is a question of law. Accordingly, our review is *de novo*. *People v. Lucas*, 231 Ill.2d 169, 173-74, 325 Ill.Dec. 239, 897 N.E.2d 778 (2008).

One of the purposes of the PLCAA is:

> "To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (2006).

To that end, the PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State court" (15 U.S.C. § 7902(a) (2006)) and a "qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending" (15 U.S.C. § 7902(b) (2006)).

A "qualified civil liability action" is:

> "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party * * *." 15 U.S.C. § 7903(5)(A) (2006).

A "qualified product" means a firearm, or ammunition, or a component part of a firearm or ammuni-

tion, "that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4) (2006).

The appellate court in this case did not address whether plaintiffs' lawsuit was a qualified civil liability action. Rather, the appellate court concluded, without analysis, that the PLCAA applied to plaintiffs' cause of action, so that plaintiffs were required to show that they fell within the exceptions to the Act in order to avoid the provisions of the Act. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

In this court, plaintiffs deny that their lawsuit is a qualified civil liability action. Plaintiffs do not dispute that their lawsuit is a civil action or proceeding against a manufacturer of a qualified product and that the Beretta is a qualified product. However, plaintiffs deny that their civil action results from the criminal or unlawful misuse of a qualified product.

The PLCAA defines unlawful misuse as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9) ***761** (2006). The PLCAA does not define " criminal" misuse. As Beretta notes, however, the word "criminal" in this portion of the statute is used as an adjective to modify the term "misuse." Black's Law Dictionary defines "criminal" in its adjective form as, "1. Having the character of a crime; in the nature of a crime <criminal mischief>. 2. Connected with the administration of penal justice <the criminal courts>." Black's Law Dictionary 402 (8th ed.2004).

In this case, Billy was adjudicated delinquent based upon the finding of the court in the juvenile proceed-

ing that Billy committed involuntary manslaughter and reckless discharge of a firearm when he shot Josh with his father's Beretta. This finding was affirmed on appeal. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23). Billy's use of the Beretta, therefore, certainly violated the Criminal Code, a statute, when he was adjudicated delinquent for involuntary manslaughter and reckless discharge of a firearm, satisfying the definition of "unlawful misuse."

In addition, involuntary manslaughter (720 ILCS 5/9-3(a) (West 2000)) and reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2000)) are criminal offenses. It follows, then, that Billy's misuse of the Beretta in this case also had the character of a crime and was "in the nature of a crime" and, therefore, was a criminal misuse.

Plaintiffs, however, argue that this court may not look to Billy's juvenile adjudication in determining whether there was a criminal or unlawful misuse because that adjudication was described in an unpublished order pursuant to Illinois Supreme Court Rule 23 (210 Ill.2d R. 23). Plaintiffs also argue that Billy's conduct could not be criminal or unlawful because Billy was adjudicated delinquent, and thus was not "convicted" of anything. Moreover, Billy had no criminal intent, so that his conduct could not be criminal. Finally, plaintiffs contend that Billy was not "using" the handgun, so there could be no unlawful "misuse" of the handgun, as required under the statute.

There is no merit to plaintiffs' claim that this court cannot look to Billy's juvenile adjudication as set

forth in the appellate court's Rule 23 order. As Beretta notes, Illinois Supreme Court Rule 23 provides that unpublished orders of the appellate court may not be cited by any party for precedential value. 166 Ill.2d R. 23(e). However, this court may take judicial notice of the Rule 23 order addressing Billy's appeal of his juvenile adjudication. See *In re Donald A.G.*, 221 Ill.2d 234, 242, 302 Ill.Dec. 735, 850 N.E.2d 172 (2006) (this court took judicial notice of Rule 23 order in underlying criminal case); *People v. Ortiz*, 196 Ill.2d 236, 265, 256 Ill.Dec. 530, 752 N.E.2d 410 (2001) (this court took judicial notice of Rule 23 order in codefendant's case).

Moreover, the definition of qualified civil liability action also does not contain a requirement that there be criminal intent or a criminal conviction. The statute only requires "the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A) (2006). With regard to intent, the PLCAA does not limit criminal misuse to specific intent crimes.

Likewise, the PLCAA does not require a criminal conviction. As Beretta observes, Congress did require a conviction in order for another exception to the PLCAA to apply. See 15 U.S.C. § 7903(5)(A)(i) (2006) ("an action brought against a transferor *convicted* under section 924(h) of Title 18, or a comparable or ***762** identical State felony law, by a party directly harmed by the conduct of which the transferee is so *convicted* " (emphases added)). When Congress includes particular language in one section of a statute but omits it in another section of the same act, courts presume that Congress has acted intentionally and purposely in the inclusion or exclusion. *Clay v. United States*, 537 U.S. 522, 528, 123 S.Ct. 1072,

1077, 155 L.Ed.2d 88, 95 (2003). Therefore, because Congress specifically included language requiring a conviction in section 7903(5)(A)(i), but did not include such language in section 7903(5)(A), we presume that Congress did not intend criminal misuse to require proof of a criminal conviction.

Finally, there is no merit to plaintiffs' claim that Billy was not "using" the Beretta, so he could not have "misused" the weapon as set forth in the definition of a qualified civil liability action. Plaintiffs assert that the PLCAA implies the weapon is being used proactively for the purpose of firing or threatening to fire a projectile, and was not designed to apply, for example, where someone "using" a weapon by holding it drops the weapon, causing it to discharge. Plaintiffs claim that Billy was not using the Beretta as a weapon because he did not intend to fire it, so that Billy was not using the firearm as that word is used in the PLCAA.

We again note that the definition of a qualified civil liability action contains no intent requirement, so it does not matter whether Billy intended to fire the Beretta. The relevant inquiry is whether the misuse of the Beretta was criminal or unlawful. Moreover, this is not a case where Billy dropped the Beretta, causing it to accidentally discharge. Rather, Billy took his father's Beretta from his parents' bedroom closet, pointed the Beretta at Josh, and pulled the trigger. Billy therefore "used" the Beretta, and that "use" constituted a criminal or unlawful misuse of the Beretta for purposes of the PLCAA. Accordingly, we find that plaintiffs' lawsuit is a qualified civil liability action as defined in the PLCAA.

Because we find that plaintiffs' lawsuit was a quali-

fied civil liability action, we next address whether the exceptions to the PLCAA apply in this case. The appellate court held that the only exception that applied in this case was the exception set forth in section 7903(5)(A)(v). 378 Ill.App.3d at 533-34, 316 Ill.Dec. 823, 880 N.E.2d 559. Plaintiffs have not challenged this finding. We therefore limit our discussion to section 7903(5)(A)(v). Section 7903(5)(A)(v) provides that a qualified civil liability action shall not include:

> "an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v) (2006).

With regard to this exception, the appellate court held that there was an issue of fact concerning whether Billy's act was volitional and whether Billy's actions were criminal or unlawful, so that it was for the trier of fact to determine whether the exception applied in this case. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court explained that if Billy's actions were criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559. However, if Billy's actions were purely accidental and not unlawful or criminal, the exception under ***763**section 7903(5)(A)(v) would apply and plaintiffs' failure to warn claim against Beretta would not be precluded. 378 Ill.App.3d at 534, 316

Ill.Dec. 823, 880 N.E.2d 559.

In questioning whether Billy's act was criminal or unlawful, the appellate court relied on the fact that Billy was adjudicated delinquent. The appellate court, citing this court's decision in *People v. Taylor*, 221 Ill.2d 157, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006), noted that a juvenile adjudication is not tantamount to a criminal conviction. In addition, Billy did not intend to shoot Josh. Accordingly, the appellate court concluded that there was a question of fact concerning whether Billy's act was volitional or criminal under the PLCAA.

We initially note that, like the definition of qualified civil liability action in section 7903(5)(A), the exception in section 7903(5)(A)(v) does not require a criminal conviction. The statute requires only that the volitional act constitute a criminal offense. As discussed, *supra,* Billy's act of shooting Josh constituted a criminal offense.

In any event, the appellate court has read our decision in *Taylor* too narrowly. Although this court in *Taylor* held that a juvenile adjudication was not tantamount to a criminal conviction, we also noted that the Juvenile Court Act was radically altered in 1999 "to provide more accountability for the *criminal acts* of juveniles." (Emphasis added.) *Taylor*, 221 Ill.2d at 165, 302 Ill.Dec. 697, 850 N.E.2d 134. Moreover, the purpose and policy section of article V of the Juvenile Court Act declares that it is the intent of the General Assembly "to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency" and, to effectuate that intent, declares among the important purposes of the Act "[t]o protect citizens from *juvenile crime*." (Emphasis added.) 705

ILCS 405/5-101(1)(a) (West 2000). Consequently, the fact that Billy was adjudicated delinquent does not mean that his actions were not criminal for purposes of section 7903(5)(A)(v).

We also find that Billy's act was a volitional act. Black's Law Dictionary defines volition as: "1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes." Black's Law Dictionary 1605 (8th ed.2004).

Likewise, Webster's defines volition as: "the act of willing or choosing: the act of deciding (as on a course of action or an end to be striven for): the exercise of the will." Webster's Third New International Dictionary 2562 (1993). Webster's defines volitional as "of, relating to, or of the nature of volition: possessing or exercising volition." Webster's Third New International Dictionary 2562 (1993).

Plaintiffs and the appellate court read volitional to require a finding that Billy intended to shoot Josh or understood the ramifications of his conduct. We disagree. As Beretta argues, even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act. Accordingly, pursuant to the PLCAA, the discharge of the Beretta in this case was caused by a volitional act that constituted a criminal offense, which the PLCAA provides "shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v) (2006). The exception for qualified civil liability actions set forth in section 7903(5)(A)(v),

therefore, does not apply, and plaintiffs' failure to warn claims are barred by the PLCAA.

*764 Plaintiffs also argue that section 7903(5)(A)(v) does not apply because Billy's act was not the sole cause of Josh's injury. Plaintiffs, however, have misread the PLCAA. The PLCAA does not require a finding that the volitional act that constituted a criminal offense be the sole proximate cause of any resulting death. Rather, the PLCAA provides that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, *then such act shall be considered the sole proximate cause of any resulting death* * * *." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v) (2006).

Plaintiffs, however, argue that the PLCAA is unconstitutional because it violates the tenth amendment to the United States Constitution. The tenth amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

Plaintiffs claim that although Congress may generally enact laws requiring or prohibiting certain acts, it may not direct the action of state governments or state officials. Plaintiffs contend that by commanding state courts to immediately dismiss pending cases, the PLCAA leaves state courts with the function of simply confirming a judicial decision that Congress has already impermissibly made. Further, the PLCAA improperly infringes on state sovereignty by dictating to states how they must conduct their lawmaking function with respect to gun liability.

The appellate court in this case rejected plaintiffs' claim that the PLCAA violates the tenth amendment. The appellate court held that "plaintiffs have confused Congress's direct regulation and preemption of state law with commandeering state functions. Congress, Beretta correctly asserts, simply established a new federal standard that governs claims against the gun industry, preempting conflicting state tort law, a common action." 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that the United States District Courts for the Eastern District of New York and the Central District of California have found that the PLCAA is constitutional. The appellate court followed those decisions on the constitutional issues. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559 (citing *City of New York v. Beretta U.S.A. Corp.* 401 F.Supp.2d 244 (E.D.N.Y.2005), and *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D.Cal.2006)).

Although the district court in *Ileto* was not presented with a tenth amendment challenge to the PLCAA, the district court in *City of New York v. Beretta* did consider and reject such a challenge. The United States Court of Appeals for the Second District affirmed that decision. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir.2008). The Court of Appeals noted that "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states." *City of New York*, 524 F.3d at 396. This is because federal statutes enacted under one of Congress' enumerated powers, such as the commerce clause, cannot violate the tenth amendment unless the statutes commandeer the states' executive officials or legislative processes. *City of New York*, 524 F.3d at 396. The Court of Appeals held that Congress validly enacted the PLCAA

under the commerce clause. *City of New York*, 524 F.3d at 394-95. The Court of Appeals further held that the PLCAA does not commandeer any branch of state government because the PLCAA imposes no affirmative duty of any kind on any branch of state government. *City of New York*, 524 F.3d at 397. The PLCAA, ***765** therefore, does not violate the tenth amendment. *City of New York*, 524 F.3d at 397.

We agree with the decision of the Court of Appeals in *City of New York v. Beretta*. Accordingly, as Beretta argues, because the PLCAA is a valid exercise of the federal power to regulate interstate commerce, Congress has not intruded upon an area of authority traditionally reserved to the states and does not impermissibly commandeer the states or their officials in violation of the tenth amendment. We therefore reject plaintiffs' constitutional challenge to the PLCAA and find that the PLCAA does not violate the tenth amendment.

As stated, we find that the PLCAA requires dismissal of plaintiffs' failure to warn claim against Beretta. We therefore reverse the appellate court's finding that there was an issue of fact concerning whether the PLCAA barred plaintiffs' failure to warn claim.

Plaintiffs' Cross-Appeal

Finally, we note that plaintiffs have filed a cross-appeal challenging the appellate court's finding that the trial court properly dismissed plaintiffs' design defect claims because the Beretta was not unreasonably dangerous as a matter of law. Plaintiffs claim that the Beretta is unreasonably dangerous under both the consumer expectation test and the

risk-utility test.

Upon review, we find that we need not consider whether the appellate court erred in finding that the Beretta was not unreasonably dangerous under the consumer expectation test and the risk-utility test. This court may affirm the appellate court on any basis in the record. *People v. Durr*, 215 Ill.2d 283, 296, 294 Ill.Dec. 115, 830 N.E.2d 527 (2005). As noted, the exception to the PLCAA set forth in section 7903(5)(A)(v) applies to "an action for death, physical injuries or property damage resulting directly from *a defect in design or manufacture of the product*, when used as intended or in a reasonably foreseeable manner." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v) (2006). We have held that the exception set forth in section 7903(5)(A)(v) does not apply in this case because the discharge of the Beretta was caused by a volitional act that constituted a criminal offense, which act shall be considered the sole proximate cause of any resulting death. Accordingly, plaintiffs' design defect claims, as well as their failure to warn claims, are barred by the PLCAA. For that reason, we affirm the dismissal of those claims.

CONCLUSION

For all the foregoing reasons, the judgment of the appellate court is affirmed in part and reversed in part and the judgment of the circuit court is affirmed.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed.

Chief Justice FITZGERALD and Justices FREEMAN, GARMAN, KARMEIER, and BURKE

concurred in the judgment and opinion.
Justice KILBRIDE took no part in the consideration or decision of this case.

APPENDIX B
Opinion of the Illinois Court of Appeal
(Nov. 29, 2007)

Appellate Court of Illinois,
First District, Fourth Division.

Hector ADAMES, Jr., and Rosalia Diaz, as Co-Special Administrators of the Estate of Joshua Adames, Deceased, Plaintiffs-Appellants,

v.

Michael F. SHEAHAN, in his Official Capacity as Cook County Sheriff, Beretta U.S.A. Corporation, and Fabbrica D'Armi Pietro Beretta S.P.A., Defendants-Appellees.

No. 1-05-3911.
Nov. 29, 2007.

***563** Michael W. Rathsack, Chicago, for Appellants.

***564** Johnson & Bell, Ltd., Chicago, for Appellee Beretta U.S.A. Corp.

Querrey & Harrow, Ltd., Chicago, for Appellee Michael Sheahan, in his official capacity as Cook County Sheriff.

MODIFIED UPON DENIAL OF REHEARING

Justice MURPHY delivered the opinion of the court:

On May 5, 2001, Joshua Adames (Josh) was shot in the abdomen while playing with William Swan (Billy). Billy's father, David Swan (David), was em-

ployed by the Cook County sheriff's department at the time. Billy, age 13, had found David's service weapon in his parents' bedroom closet and was playing with it when Josh came over. While playing, Billy accidentally shot Josh in the stomach and he died as a result of the abdominal wound.

Plaintiffs, Hector Adames, Jr., and Rosalia Diaz, co-special administrators of the estate of Joshua Adames, brought suit against various defendants. At issue on appeal are plaintiffs' claims against defendant Cook County Sheriff Michael F. Sheahan (Sheahan) and defendant Beretta U.S.A. Corp. (Beretta). Following the conclusion of discovery, the trial court granted defendants' separate motions for summary judgment. Plaintiffs now appeal the trial court's orders granting defendants' motions for summary judgment. For the following reasons, we affirm in part and reverse in part the findings of the trial court and remand this matter for a new trial.

I. BACKGROUND

A. Billy Swan

On the morning of Sunday, May 5, 2001, Billy was home alone while his mother was at work and David and his brother went out. Billy called Josh and invited him over to play. Billy went into his parents' bedroom to watch through their window for Josh's arrival. Billy knew that inviting Josh over and going into his parents' bedroom were both against the rules.

Billy noticed that his parents' closet do or was open and he saw a box on a shelf. Billy retrieved the box, which was unlocked and contained three guns be-

longing to David, including a Beretta 92 Series handgun (handgun) with a full magazine clip of bullets. Billy never saw his father carry or clean a gun in the house, but thought that his father might have a gun.

Billy had never handled a gun before, but he picked up the handgun and pushed a button that released the magazine holding the bullets. Billy replaced the clip and removed it several times. He also moved the slide mechanism at the top of the handgun and a bullet popped out. Billy repeatedly removed and replaced the bullets and magazine from the handgun. Billy stated that he understood the handgun to be loaded when the magazine was in place. However, he thought that bullets came out of the top of the magazine when the handgun was fired, not from within the chamber of the handgun. Billy also thought that removing the magazine fully unloaded the handgun.

After a few minutes, Billy saw his friend, Michael, riding his bicycle outside. Billy took the three guns, put them in his pockets and went downstairs to see Michael. Billy showed Michael the guns and how they worked. Josh arrived and Michael went to another room in Billy's house.

Billy and Josh began wrestling and playing around. Billy showed Josh the handgun, ejecting the magazine and bullets as described above. Billy removed the magazine and the bullet using the slide on the handgun, placing the bullets and magazine ***565** in his pocket. Billy first pretended to fire the handgun six or seven times at Josh before he actually pulled the trigger. Billy knew the handgun was dangerous and it could hurt or kill somebody, but he thought that the magazine had to be loaded in the handgun to fire a bullet. Tragically, the handgun discharged a

chambered bullet that hit Josh in the abdomen.

Billy ran upstairs and put the guns back in his parents' closet. Billy then ran back downstairs and realized that he had shot Josh. He called 911 and told the dispatcher that he found a gun and accidentally shot his friend while playing. Billy also stated that he did not know there were any bullets in the handgun.

Billy was subsequently found delinquent in juvenile court proceedings relating to the shooting. The delinquency holding was based on a finding that Billy committed involuntary manslaughter and reckless discharge of a firearm. Billy was placed on probation. This court affirmed the delinquency finding of the juvenile court. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23).

B. David Swan

David testified that he graduated from the police academy in 1988, was deputized with the Cook County sheriff around January 1988, and promoted to lieutenant in 1997 or 1998. David carried a gun with him to work as an officer. When David started with the sheriff's office, his service revolver was a Smith & Wesson .38 Special. Eventually, he became certified in automatic weaponry and the handgun became his service handgun. David was promoted to supervisor and no longer needed his handgun on the job and, therefore, rarely brought it to work. David continued as a supervisor after the incident, even though all of his firearms were confiscated by the police investigators.

David testified that he owned three guns: the handgun, the .38 Special, and a .25 automatic. All three guns were stored in the same locking case, along with ammunition. David stored the case, and additional ammunition, on the top shelf in his closet. He maintained one key to the case on his key ring and an additional key in the junk drawer of his dresser. Approximately a year before the shooting, David completed his annual firearm qualification. David disagreed with Billy's testimony and stated that he locked up all three guns in the lockbox, returned them to the top shelf in his closet and did not touch the guns after that date. For the purposes of defendants' summary judgment motions and these proceedings, the presumption is that the lockbox was unlocked.

David understood that the sheriff's office required deputies to secure and store their weapons in either a locking box, like he used, or with a trigger lock. David testified that, pursuant to department requirements, he stored the ammunition separately from the handgun and that the handgun was stored without a bullet in its chamber. David knew how to check if a bullet was in the chamber and how to clear the weapon. David also knew about trigger locks, but did not have one and did not look into purchasing one for his handgun. However, David was not aware that the handgun would fire a bullet with the magazine removed. David also was unaware of a settlement by Beretta in a different case that included an agreement to include either magazine disconnect safeties in all guns sold after January 1, 2001, or a warning label that the firearm is capable of firing when the magazine is not engaged.

David stated that his house rules included a prohibi-

tion on any child in the parents' bedroom at any time and no one ***566** outside the family was allowed in the house when he or his wife was not home. David testified that he reminded Billy of this rule on May 5, 2001, and Billy told him that he was going to go to the park. David speculated that Billy found the lockbox and the key and gained access to the gun. However, from the moment he returned to the house after the shooting to the day of his deposition, Billy had never openly discussed the shooting. David admitted that he never informed his children that he maintained guns in the household and that he never taught them gun safety.

In response to the shooting, Sheahan filed a complaint against David before the Merit Board claiming that David failed to properly secure and store his handgun. David's guns were taken from him by the police in their investigation and never returned to him. Following a bench trial, David was found not guilty of criminal charges based on the proscription under section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2004)) against improper storage of a firearm in a premise in which a minor under 14 is likely to gain access to the firearm.

C. Sheriff's Office Rules and Policies

Sheahan's general counsel, executive director, and weapons training officers testified to the department's rules and procedures and training programs. At the time of the incident, Sheahan had a general order in place that mirrored or exceeded the requirements of section 24-9 of the Criminal Code of 1961. 720 ILCS 5/24-9 (West 2004). The purpose of the general order is to promote safe gun usage, citing 1,134 Americans were killed in 1997 from accidental

shootings and that, annually, about 300 children are killed in accidental shootings. The general order requires officers to secure duty weapons in a secured lock box container or other location that would prohibit access by unauthorized persons to avoid accidents. In addition, officers are required to store any keys to such locking devices in a secure location separate from the weapon. Officers were taught to expect children to look everywhere in their homes. Therefore, weapons must always be inaccessible to children and properly stored to avoid accidents with children.

Sheahan's training program also included materials on educating family members, particularly children. Education of children was detailed as an additional responsibility beyond proper storage. Specifically included in the materials is the recommendation to openly discuss firearm safety with children and avoid ignoring the issue.

Officers are informed that their responsibility for their firearm includes unintentional discharge because of improper storage, education, or disarming of the firearm. Officers were re certified in their firearms annually, which included a program on home firearm safety. Although David did not need a weapon to perform his duties as a supervisor, he completed this program annually.

D. The Handgun

Extensive testimony and documentation was presented regarding the handgun itself and various safety measures available in the industry. The handgun is a semiautomatic pistol designed for law enforcement and military use. The handgun is loaded

by filling the magazine with bullets and inserting the filled magazine into the magazine well. The handgun is prepared for discharge by chambering the first round, pulling the slide to the rear of the handgun, and releasing it. When the safety is off, the handgun may be fired by its double- action trigger pull. After the chambered round is fire d, the slide recoils to the rear, the spent cartridge is ejected, *567 and the next live round is chambered upon the return of the slide.

This process will continue each time the trigger is pulled until the magazine is empty, at which time the slide remains locked open until the slide catch lever is released. Therefore, the user knows when firing the handgun that the magazine and chamber have been emptied. A user may also check if a round has been chambered by manually pulling the slide back and visually determining if a round has been loaded. Additionally, the handgun has a chamber loaded indicator-a small extractor head painted red-that protrudes from the side of the slide when the chamber is loaded. Other safety devices on the weapon include: an ambidextrous safety-decocking lever; a hammer drop catch; a flared and serrated trigger guard; an automatic firing pin catch; a two-piece inertial firing pin unit; a reversible magazine release button; and a slide overtravel stop. Beretta did not include a magazine disconnect safety on this model.

Each handgun sold by Beretta was packaged with an instruction manual that included specific warnings and safety instructions. Like the training provided by Sheahan, the instruction manual contains repeated warnings of the dangers of firearms and the importance of proper handling and storage to avoid

accidental injury or death. In particular, it contains advice to owners to store guns in locked storage units out of reach of children with ammunition stored separately.

Further, the manual contains advice to owners to make sure the cartridge chamber is empty when storing the handgun. Explicit step-by-step instructions on how to safely and completely unload the handgun are provided. The manual also includes instructions on how to fully engage the safety, release the magazine, fully retract the slide to extract and eject the chambered cartridge, and, finally, visually inspect the open slide and magazine well to ensure all cartridges have been completely ejected. This information is repeated several times in the manual.

E. Expert Testimony

Plaintiffs presented witnesses who opined that the gun as designed was unreasonably dangerous. Plaintiffs' expert, Stanton Berg, a firearms consultant, admitted that an accident-proof handgun is impossible, but claimed that repetitive accidents may be designed out by gun manufacturers. Berg opined that if the handgun had a magazine disconnect safety, a device that stops the firearm from firing when the magazine is not fully inserted, the shooting in this case would not have occurred. Berg noted that this safety device was invented in 1910 and had even been used by Beretta on 92 Series handguns utilized by some police departments. Berg listed over 300 models of handguns that utilize a magazine disconnect safety and concluded that a handgun without such a safety is defective.

Berg continued to opine that the chamber loaded in-

dicator located on the side of the slide was insufficient. He claimed the indicator was too small to provide an effective warning that a bullet was chambered. Berg also testified that the handgun should contain a warning on the firearm itself that it could be fired with the magazine removed. Berg admitted on cross-examination that the nature and function of a firearm is to discharge a projectile at a high rate of speed. Berg stated that the majority of law enforcement agencies in the country utilized firearms without a magazine disconnect safety. Berg also admitted that it was a valid concern of these agencies to assure that they utilize firearms without anything that threatened to be an impingement on the firing of the gun.

***568** Wallace Collins, a firearms and ammunition design and safety expert, testified to his study of safety assists suitable for handguns. Collins determined that the following safety characteristics were available at the time the handgun was manufactured, but were not included: a magazine disconnect safety; a warning that the gun will fire when the magazine is released; a better-located chamber-loaded indicator with clear directions; and a key lock. Therefore, Collins concluded that the handgun was unnecessarily dangerous.

Collins testified that these safety features were readily available, inexpensive, and commercially feasible. Collins opined that the key safety component that was missing was the magazine disconnect safety. Collins concluded that countless accidents like the shooting in this case could be avoided by the implementation of the devices.

Stephen Teret, a professor of epidemiology for the

School of Public Health at Johns Hopkins University, also was deposed as a witness for plaintiffs. Teret prepared a report on the shooting and testified that he concluded that the absence of a magazine disconnect safety caused the shooting in this case. Teret included data in his report from a survey designed by the Johns Hopkins Center for Gun Policy and Research, performed by the National Opinion Research Center and reported in the Journal of Public Health Policy. The survey asked respondents whether they thought that a pistol can still be shot when its magazine is removed. Of the 1,200 respondents: 65% answered the pistol could still be fired; 20.3% answered the pistol could not be fired; 14.5% did not know; and .2% refused to answer. Of the 34.8% who responded that the pistol could not fire when the magazine is removed or that they did not know, 28% lived in a gun-owning household. Teret also testified that he felt the chamber loaded warning was not effective and could not possibly warn people who have no knowledge about guns.

Witnesses for Beretta testified that they understood that children gain access to guns and accidental shootings have occurred both with and without the magazine inserted in the gun. It was agreed that this incident would not have occurred with a magazine disconnect safety installed on the handgun. It was further admitted that Beretta was capable of manufacturing guns with such a feature at a cost of up to $10 per gun. However, Beretta did not include a magazine disconnect because there was no market demand for that feature. Beretta also admitted to other manufacturers' use of the aforementioned safety devices on their handguns.

Beretta introduced evidence that the Beretta FS is

utilized by police departments throughout the country. Testimony was presented that the handgun, as manufactured, met or exceeded industry standards. Further testimony on behalf of Beretta claimed that for the past 20 years, the vast majority of law enforcement agencies have consistently expressed a preference for no magazine disconnect safety or internal locking devices. Law enforcement officers and agencies do not want weaponry that may become inoperable by an inadvertent release of the magazine, that could possibly jeopardize the safety of officers and the public.

F. Motions for Summary Judgment

Both defendants filed motions for summary judgment. The trial court granted the motions in separate orders dated August 23, 2005. With respect to Sheahan, the trial court found that questions of material fact remained to preclude summary judgment on plaintiffs' arguments regarding the propriety of weapon storage and scope of employment. However, summary ***569** judgment was granted based on the trial court's finding that Sheahan did not have a duty to protect the victim from the criminal acts of Billy Swan. The trial court also noted that, had a duty existed, the cause of the harm was not reasonably foreseeable.

Beretta argued in its motion for summary judgment that its product was not unreasonably dangerous, it had no duty to warn due to the obvious danger, and that Billy Swan's actions were an intervening cause. Beretta's motion was granted in its entirety. Plaintiffs timely filed their appeal of these two rulings.

II. ANALYSIS

Summary judgment may be granted when "the pleadings, depositions, and admissions on file, [and] affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2004). The sole function of the trial court is to determine if material issues of fact exist; it is not to try the issues. *Kim v. Citigroup, Inc.*, 368 Ill.App.3d 298, 305, 305 Ill.Dec. 834, 856 N.E.2d 639 (2006). We review an order granting summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill.2d 342, 349, 233 Ill.Dec. 643, 701 N.E.2d 493 (1998). While we also review the evidence in a light most favorable to the nonmovant, we cannot ignore evidence unfavorable to the nonmovant and may sustain the trial court on any basis called for in the record. *Ruane v. Amore*, 287 Ill.App.3d 465, 474, 222 Ill.Dec. 570, 677 N.E.2d 1369 (1997).

Plaintiffs assert five issues on appeal. With respect to Sheahan, plaintiffs argue that the trial court erred in finding that Sheahan had no duty to Josh and that Billy Swan's conduct was criminal and an independent intervening cause. As to the claims against Beretta, plaintiffs argue that the trial court erred in: failing to find that the handgun was unreasonably dangerous from failure to include a magazine disconnect or a sufficient chamber loaded indicator; failing to find that the handgun was unreasonably dangerous for failing to adequately warn the user; and, as with Sheahan, finding that Billy Swan's conduct was an independent intervening cause superceding Beretta's legal responsibility. However, Beretta asserts in its response and sur-reply that the United

States Congress's enactment of the Protection of Lawful Commerce in Arms Act (PLCAA) (Pub.L. 109-12, 119 Stat. 2095 (2005)) (adding 15 U.S.C. § 7901 through 7903) provides gun manufacturers immunity from claims such as those advanced by plaintiffs.

A. Scope of Sheahan's Duty to Third Parties

Plaintiffs first argue that the trial court erroneously determined that Sheahan had no duty to protect Josh from a criminal attack. While the question of duty is a question of law to be determined by the trial court, plaintiffs maintain that because of the trial court's reliance on the criminal attack, it failed to examine the proper factors to determine whether a party owes a duty to another. Plaintiffs argue that they established the factors relevant to the establishment of a duty, namely: reasonable foreseeability of the injury; the likelihood of injury; the magnitude of the burden to guard against such an injury; and the consequences of placing that burden on the defendant. *Ward v. K mart Corp.*, 136 Ill.2d 132, 140-41, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990). Therefore, plaintiffs argue that the finding of the trial court must be reversed.

Plaintiffs argue that Sheahan owed a duty to Josh. Plaintiffs cite the rules and training materials created by the sheriff's department requiring safe and secure storage ***570** of handguns by officers. In addition, plaintiffs argue that under common law and section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2004)), Sheahan has a duty to assure his deputies safely secure their service firearms away from children. Furthermore, plaintiffs note that in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41,

236 Ill.Dec. 40, 706 N.E.2d 914 (1998), which is taught to deputies during weapons training, this court found the defendant city liable for one of its police officer's failure to properly st ore his fire arm.

In *Gaffney*, a police officer for the City of Chicago stored his unloaded service revolver and bullets together in an unlocked metal cabinet in his home. The officer's minor son took the unsecured revolver and bullets to a party and shot and killed a boy. The minor shooter was subsequently adjudicated delinquent for the shooting. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. This court reversed the trial court's grant of judgment notwithstanding the verdict to the City and found that the officer was acting within the scope of his employment at the time he stored his revolver. *Gaffney*, 302 Ill.App.3d at 43-44, 236 Ill.Dec. 40, 706 N.E.2d 914. Although the police department had no rules, general orders, or directives requiring officers to lock up guns at home, this court found that the officer was acting within the scope of his employment when storing his revolver at home. This court specifically cited to the police department's training and disciplining officers for off-duty weapon storage issues, testimony that the officer was required to perform authorized tasks whenever the need arose, and the officer's testimony that he stored the revolver unlocked to assure he could carry out his duties on a moments notice. This evidence supported the conclusion that a triable issue of fact remained that he was acting within the scope of employment in storing his revolver. *Gaffney*, 302 Ill.App.3d at 48-49, 236 Ill.Dec. 40, 706 N.E.2d 914. Plaintiffs highlight testimony of Sheahan's range master that *Gaffney* is taught because it establishes liability against an officer and the department if an unauthorized person gains access to an improp-

erly stored handgun.

Plaintiffs also assert that the trial court erred in finding that a criminal attack even occurred. Plaintiffs note that Billy testified that the shooting was an accident and that defendants' experts agreed as much. Therefore, plaintiffs claim that since the shooting was unintentional, it was not a criminal attack and did not support the trial court's judgment. Plaintiffs argue that this case involved an accident by someone who clearly did not actively intend the out come. Plaintiffs assert that even if one is found guilty of reckless or negligent conduct, he may still seek contribution from a negligent third party if he has not committed an intentional tort. Therefore, they conclude that they should not be barred from seeking compensation for Billy's negligence. See *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 204 Ill.Dec. 178, 641 N.E.2d 402 (1994).

Furthermore, plaintiffs argue that the trial court relied upon an unpublished order entered pursuant to Supreme Court Rule 23. Plaintiffs note that the trial court's only reference to evidence of the juvenile proceeding against Billy was to the Rule 23 order and no other evidence is of record. Plaintiffs assert that the Rule 23 order has no precedential value and cannot be utilized for this purpose. *Price v. Hickory Point Bank & Trust*, 362 Ill.App.3d 1211, 1221, 299 Ill.Dec. 352, 841 N.E.2d 1084 (2006). Therefore, plaintiffs claim the trial court had no support for its finding.

***571** Sheahan responds that a party does not have a duty to protect another from criminal attack absent a special relationship unless it voluntarily undertakes actions to protect that person. *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 215-16, 126 Ill.Dec. 519,

531 N.E.2d 1358 (1988). Special relationships that have been found to create a duty are: common carrier and passenger; innkeeper and guest; business inviter and invitee; and voluntary custodian and protectee. *Hernandez v. Rapid Bus Co.*, 267 Ill.App.3d 519, 524, 204 Ill.Dec. 456, 641 N.E.2d 886 (1994). Sheahan concludes that no special relationship existed with Josh and that he did not perform any voluntary undertaking to create a duty to protect Josh. Sheahan argues that the recent trend in cases has identified a fear of the expansion of liability and the special relationship rule. See *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004); *Young v. Bryco Arms*, 213 Ill.2d 433, 290 Ill.Dec. 504, 821 N.E.2d 1078 (2004); *Charleston v. Larson*, 297 Ill.App.3d 540, 231 Ill.Dec. 497, 696 N.E.2d 793 (1998).

Sheahan notes that, though the Rule 23 order affirming the delinquency adjudication was not included in the record, the trial court cited to the order. Sheahan adds that this court may take judicial notice of its own opinions and attached the order to his brief for that purpose. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill.2d 167, 177, 278 Ill.Dec. 92, 797 N.E.2d 687 (2003). Contrary to plaintiffs' assertion, Sheahan argues that the Rule 23 order has a preclusive effect to the extent that it affirmed Billy's adjudication and that it was not utilized as precedent based on its legal analysis. Furthermore, Sheahan argues that the information is of record as David testified to the findings of the juvenile court against Billy. As to the actual crime committed, Sheahan points out that specific intent is not required for involuntary manslaughter and Billy's reckless behavior does not remove the criminality of that conduct.

Sheahan continues that a duty may not be estab-

lished by internal rules and policies. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213, 238, 216 Ill.Dec. 703, 665 N.E.2d 1260 (1996). Sheahan argues that the training and general orders with respect to gun safety may establish a standard of care applicable to his officers, but do not establish a duty. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 295, 246 Ill.Dec. 654, 730 N.E.2d 1119 (2000). Sheahan distinguishes *Gaffney* on this subject, asserting that the *Gaffney* court did not examine the question of duty. Sheahan notes that the issue in *Gaffney* was whether the defendant police officer was acting within the scope of his employment when he stored his gun at home. *Gaffney*, 302 Ill.App.3d at 48-49, 236 Ill.Dec. 40, 706 N.E.2d 914. In addition, Sheahan asserts that there was no criminal conviction of the child who accessed the gun in that case.

Sheahan concludes that, most importantly, the shooting was not foreseeable and, therefore, no duty could exist. Sheahan maintains that David could not reasonably foresee that Billy would: break his rules against children in the bedroom; find the gun box; unload the gun box; load and unload the gun; and finally shoot Josh. Sheahan argues that this lack of foreseeability takes this case out of the firearms storage statute and no duty existed as a matter of law.

As noted above, the trial court denied the motion to dismiss on the scope of employment issue because an issue of fact remained, but granted the motion on the duty issue. Therefore, Sheahan maintains that this is not a scope of employment ***572** case. However, plaintiff sought damages against Sheahan based on the principle of *respondeat superior*. A discussion of the relevant principles of *respondeat superior* should illuminate and resolve this issue.

"The general rule is that a person injured by the negligence of another must seek his or her remedy from the person who caused the injury. The relation of employer and employee is an exception to this general rule. *Darner v. Colby*, 375 Ill. 558, 560 [31 N.E.2d 950] (1941); *Metzler v. Layton*, 373 Ill. 88, 91 [25 N.E.2d 60] (1939). Under the theory of *respondeat superior*, an employer can be liable for the torts of an employee, but only for those torts that are committed within the scope of the employment. *Wright v. City of Danville*, 174 Ill.2d 391, 405 [221 Ill.Dec. 203, 675 N.E.2d 110] (1996); *Pyne v. Witmer*, 129 Ill.2d 351, 359 [135 Ill.Dec. 557, 543 N.E.2d 1304] (1989). Indeed, the employer's vicarious liability extends to the negligent, willful, malicious, or even criminal acts of its employees when such acts are committed within the scope of the employment. See *Mitchell v. Norman James Construction Co.*, 291 Ill.App.3d 927, 932 [225 Ill.Dec. 881, 684 N.E.2d 872] (1997); *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 964 [120 Ill.Dec. 784, 524 N.E.2d 966] (1988); *Webb v. Jewel Cos.*, 137 Ill.App.3d 1004, 1006 [92 Ill.Dec. 598, 485 N.E.2d 409] (1985).

The term 'scope of employment,' used interchangeably with 'in the course of the employment,' refers to a 'bare formula,' whose 'very vagueness has been of value in permitting a desirable degree of flexibility in decisions.' W. Keeton, Prosser & Keeton on Torts § 70, at 502 (5th ed.1984). The Second Restatement of Agency has identified three general criteria in determining whether an employee's acts are within the scope of employment.

'(1) Conduct of a servant is within the scope of em-

ployment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master * * *[.]

* * *

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. (Restatement (Second) of Agency § 228 (1958).) *Pyne*, 129 Ill.2d at 360 [135 Ill.Dec. 557, 543 N.E.2d 1304].' " *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163-64, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007).

"Under the doctrine of *respondeat superior*, a principal may be held liable for the tortious actions of an agent which cause a plaintiff's injury, even if the principal does not himself engage in any conduct in relation to the plaintiff." *Woods v. Cole*, 181 Ill.2d 512, 517, 230 Ill.Dec. 204, 693 N.E.2d 333 (1998). This is so even though "[o]nly the agent is at fault in fact for the plaintiff's injuries." *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill.2d 347, 354, 181 Ill.Dec. 917, 609 N.E.2d 285 (1992).

Both before the trial court and this court, Sheahan strenuously argues that David violated sheriff's department regulations and numerous directives of

staff *573 members of the sheriff's department when he failed to put the handgun in a secure locked box. However, it is a well-settled legal principle that where an agent does an act in the course of his employment, although the principal did not authorize or participate in, or know of the conduct, or even if he forbade the acts or disapproved of them, the rule of *respondeat superior* applies. *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill.2d 415, 424-25, 45 Ill.Dec. 96, 412 N.E.2d 447 (1980).

Our supreme court most recently addressed the rule of *respondeat superior* in *Bagent*. There, the court held that "all three criteria of section 228 of the Second Restatement of Agency must be met to conclude that an employee was acting within the scope of employment." *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. The court further held that whether an employee was acting within the scope of employment depends on "the employment contract and the nature of the relationship, which must exist at the time of and in respect to the particular facts out of which the injury arose." *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. Section 229 sets out a nonexhaustive list of several factual matters to consider in determining whether the complained-of act is so similar or incidental to employer-authorized conduct:

"Pertinent matters include: whether the act is one commonly done by such employees; the time, place, and purpose of the act; the previous relations between the employer and the employee; whether the act is outside the enterprise of the employer or, if within the enterprise, has not been entrusted to any employee; whether the employer has reason to

> expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether the employer furnished to the employee the instrumentality by which the harm is done; and the extent of departure from the normal method of accomplishing an authorized result." *Bagent*, 224 Ill.2d at 166-67, 308 Ill.Dec. 782, 862 N.E.2d 985, citing Restatement (Second) of Agency § 229(2) (1958).

An employer's warning to an employee to act with care does not remove an employer from vicarious liability. Although an express prohibition may argue against an act being within the scope of employment, it is only a factor in determining the issue. *Bagent*, 224 Ill.2d at 167-68, 308 Ill.Dec. 782, 862 N.E.2d 985. It is the plaintiff's burden to show the contemporaneous relationship between the tortious act and the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. However, for purposes of summary judgment, it must be shown that no reasonable person could conclude from the evidence that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985.

We find that the facts of this case are similar to those presented in *Gaffney* and that case is controlling. The *Gaffney* court considered the aforementioned factors from sections 228 and 229 of the Restatement. *Gaffney*, 302 Ill.App.3d at 51-52, 236 Ill.Dec. 40, 706 N.E.2d 914. As in this case, Sheahan would be hardpressed to say that officers did not store their weapons at home; in fact, like in *Gaffney*, the specific training and materials on proper storage supports a finding that the act is incidental to an act David was hired to perform. While David did not

carry his weapon to work daily like the defendant police officer in *Gaffney*, and he did not testify that he stored his gun unlocked to respond to any emergency in his presence, he did testify that he owned the firearm *574 because of his job and annually was certified to use the firearm as required by Sheahan. David's continued storage of the gun was not outside the enterprise of his employer and David maintained the firearm for the purpose of serving as a deputy sheriff. As in *Gaffney*, the evidence that Sheahan further disciplined officers for improper storage supports the conclusion that such storage is incidental to employment. This also argues to the factor that the improper storage was not an act that the servant was unlikely to do.

These facts also support a finding that David was acting within the authorized time and space limits of his employment. In addition to the above, testimony was presented that there were insufficient storage opt ions at the department and home storage was expect ed. While David testified that he did not carry his firearm to work for his daily duties, the fact remains that he did at one time, he owned the firearm for work purposes, he would be required to use it in an emergency, he was certified annually to use the firearm, and he ultimately was disciplined by Sheahan for his improper storage. While the facts of this case do not present the same explicit testimony from *Gaffney* about an officer's being "on duty" 24 hours a day, these facts argue in favor of finding David was acting within the scope of employment and Sheahan is liable for David's alleged tortious actions.

Accordingly, we must determine whether the trial court erred in finding Billy's actions foreclosed a duty to the victim. First, we note that neither side dis-

cussed the importance of the fact that Billy's adjudication of delinquency was conducted, naturally, pursuant to the Juvenile Court Act of 1987. 705 ILCS 405/1-1 *et seq.* (West 2004). Although both the trial court and Sheahan repeatedly raise the import of Billy's "conviction" for criminal acts, our supreme court recently rejected this categorization. *People v. Taylor*, 221 Ill.2d 157, 163-71, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006). The *Taylor* court highlighted the Juvenile Court Act procedures both before and after its major amendments in 1999 and found that a juvenile adjudication has never been a "conviction" as defined under the Criminal Code of 1961. 720 ILCS 5/2-5 (West 2004).

Under the Criminal Code, a conviction requires either a plea of guilty or a verdict entered by a jury or court of competent jurisdiction authorized to try the case without a jury. 720 ILCS 5/2-5 (West 2004). Although a juvenile may plead guilty under section 5-605 of the amended Juvenile Court Act (705 ILCS 405/5-605 (West 1998)), minors do not have a right to a jury trial under that act within the meaning of the sixth amendment. *Taylor*, 221 Ill.2d at 168, 302 Ill.Dec. 697, 850 N.E.2d 134. In fact, delinquency proceedings are not criminal, but civil in nature, intended to correct and rehabilitate, not punish. *In re R.G.*, 283 Ill.App.3d 183, 186, 218 Ill.Dec. 699, 669 N.E.2d 1225 (1996). Further, under the Juvenile Court Act, the State may move to permit prosecution of the juvenile under the criminal laws if the alleged offense is of such a serious nature. 705 ILCS 405/5-805(3) (West 2004). Therefore, a juvenile adjudication is not tantamount to a criminal conviction. *Taylor*, 221 Ill.2d at 170, 302 Ill.Dec. 697, 850 N.E.2d 134.

We also note that in civil cases, Illinois courts have similarly differentiated between criminal behavior by an adult and a minor in discussing public policy. In the context of an insurance coverage dispute and application of the inferred-intent standard, this court affirmed that public policy in Illinois favors affording compensation to victims. *575 *Country Mutual Insurance Co. v. Hagan*, 298 Ill.App.3d 495, 232 Ill.Dec. 433, 698 N.E.2d 271 (1998). The *Hagan* court likened exclusionary provisions in insurance policies to negligence cases where specific intent to injure requires an ability to foresee the consequences of an act. The court refused to infer that a 14-year-old minor insured had the capacity to form the intent to sexually abuse a 6-year-old was a question for the trier of fact. *Hagan*, 298 Ill.App.3d at 505, 232 Ill.Dec. 433, 698 N.E.2d 271. The court concluded that holding perpetrators responsible for actions they intend but of which they have little understanding of the ramifications, would have little deterrent effect and would be far outweighed by the policy in favor of compensating victims. *Hagan*, 298 Ill.App.3d at 505, 232 Ill.Dec. 433, 698 N.E.2d 271.

Accordingly, Billy was not convicted of a crime. Sheahan correctly notes that *Gaffney* did not involve a criminal conviction of the minor that accessed his father's gun. Indeed, similar to this case, *Gaffney* involved a juvenile court delinquency adjudication of the minor. Although *Gaffney* did not include an analysis of the import of the minor's adjudication, it is not distinguishable on this point as Sheahan maintains.

The question that remains is whether *Taylor* impacts the trial court's, and Sheahan's, reliance on the adjudication to foreclose a duty. Although plaintiffs' ar-

gument that Billy's lack of intent eliminates the criminality required to overcome duty is misguided, the element of intent does take on more importance when viewed in light of *Taylor*. Plaintiffs argue that Billy did not intend to hurt Josh; therefore, there was no criminal attack, but merely an accident. As such, plaintiffs conclude that there was no intervening criminal attack to foreclose a duty to the victim. This reasoning is in line with that of the *Hagan* court.

The determination of duty is a question of law, that question may only be answered upon review of the factual circumstances of the particular case. *Hernandez*, 267 Ill.App.3d at 522, 204 Ill.Dec. 456, 641 N.E.2d 886. Taking a view of plaintiffs' presentation of facts under a favorable view, we find that this incident was reasonably foreseeable. Whether Billy's actions were accidental or reckless is a question of material fact that remains for the trier of fact to determine.

Plaintiffs assert that they did not cite to Sheahan's rules and orders to establish a duty, but to show that an incident like the instant situation was eminently foreseeable. Plaintiffs argue that Sheahan's repeated warnings to lock firearms and store ammunition separately and citing to *Gaffney* to underscore the importance of doing so in a place away from children clearly indicate this case was foreseeable. Under plaintiffs' theory, David stored the handgun next to ammunition in an unlocked storage case in an unlocked closet where a 13-year-old boy could easily access such an item of natural "magnetic" intrigue. These particular facts, coupled with the evidence of an acute awareness by Sheahan of these types of incidents, section 24-9 of the Criminal Code, titled

"Firearms; Child Protection" (720 ILCS 5/24-9 (West 2004)), and data that this exact scenario plays out across the country every year, indicate the accident was foreseeable for the purposes of summary judgment.

As noted above, the trial court found that no duty existed because of the lack of foreseeability of a criminal attack and the lack of special relationship. Aside from a citation to *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004) and our supreme court's specific reluctance to expand duty where it would impose potentially limitless liability for the acts of another, *576 the trial court did not discuss the additional duty factors of the likelihood of injury, the magnitude of the burden to guard against the injury or the consequences of imposing that burden. While under *Ruane* this court may affirm the trial court on any basis in the record, the record in this case does not support an argument that such a duty would be so onerous.

Sheahan argues that even if this shooting was foreseeable, the other factors required to establish duty have not been met. Most importantly, Sheahan asserts that the magnitude and burden of guarding against this type of injury is too high to create a duty. Sheahan maintains that rigorous training is undertaken in teaching gun safety and proper gun storage and to require more of the department would be tantamount to "tucking them in bed" and be unduly burdensome. In conclusion, he argues that establishing a duty in this scenario would open the door to ruinous liability claims against the county anytime an officer's gun is misappropriated and used for harm.

We reject Sheahan's argument that no duty exists based on these additional factors. First, as noted above, Sheahan is vicariously liable under the principle of *respondeat superior* for the torts of his employees when committed within the scope of employment. Second, the likelihood of injury follows the foreseeability discussion above. The record is replete with testimony and evidence that this type of accident is all too common and foreseeable. Our legislature has seen fit to protect children by codifying safe gun storage practices in a statute section entitled "Firearms; Child Protection." 720 ILCS 5/24-9 (West 2004). Sheahan notes that *Gaffney* involved a scope of employment issue and not a consideration of duty. While *Gaffney* did not include a duty analysis, it ostensibly involved a finding that the defendant city had a duty to protect children from the negligent actions of its police officers. This situation is distinguishable from a resultant crime spree with a stolen gun; it is exactly the scenario the legislature and law enforcement have foreseen and tried to limit. The public interest in protecting children from this harm simply outweighs the burden of assuring police officers properly store their weapons. David's storage of his firearm was incidental to his conduct authorized by Sheahan and summary judgment was improper on this issue.

B. Proximate Cause and Independent Intervening Cause

Plaintiffs next argue that Billy's actions were not an independent intervening cause that superseded Sheahan's negligence or Beretta's legal responsibility. Plaintiffs assert that they satisfied the foreseeability criterion, both cause in fact and legal cause, to

establish a duty and determine proximate cause. Based on the argument above, plaintiffs claim that Billy's actions were foreseeable and summary judgment was improper.

To establish proximate cause, a party must first show that the defendant's negligence was the actual cause of the injury. *Bourgonje v. Machev*, 362 Ill.App.3d 984, 1007, 298 Ill.Dec. 953, 841 N.E.2d 96 (2005). Plaintiffs assert that if the handgun was properly stored and secured as required by statute and Sheahan's general order, the shooting would not have occurred. Therefore, they argue that they established cause in fact, the first prong of proximate cause.

The second prong, legal cause, is met if it can be shown that the defendant's conduct was so closely tied to the injury that he may be found legally responsible. *Bourgonje*, 362 Ill.App.3d at 1007, 298 Ill.Dec. 953, 841 N.E.2d 96. Plaintiffs note ***577** that the exact harm involved need not be foreseeable, but only that some harm might result. *Brannon v. Southern Illinois Hospital Corp.*, 69 Ill.App.3d 1, 10, 25 Ill.Dec. 162, 386 N.E.2d 1126 (1978). Plaintiffs argue that the facts in this case present a strong argument for legal cause because the injury suffered is the exact type of harm the handgun storage statute and Sheahan's rules were enacted to prevent.

Because of this, plaintiffs argue that the trial court erred in finding Billy's actions an independent intervening cause. In order to escape liability as an intervening cause, an event must be unforeseeable as a matter of law. *Mack v. Ford Motor Co.*, 283 Ill.App.3d 52, 57, 218 Ill.Dec. 465, 669 N.E.2d 608 (1996). Plaintiffs highlight as error the trial court's

characterization that Billy loaded and unloaded the handgun before firing it at Josh. Plaintiffs claim that the court erred in making this characterization and then finding that Billy engaged in a criminal act. Plaintiffs contend that, even if some element of Billy's conduct was criminal, such criminal activity is no longer an independent intervening act *per se* under *Bourgonje*. *Bourgonje*, 362 Ill.App.3d at 1008, 298 Ill.Dec. 953, 841 N.E.2d 96. As noted above, plaintiffs focus on the fact that Billy did not intend to shoot Josh. Therefore, Billy's actions were foreseeable and did not supersede Sheahan's liability. Plaintiffs assert that if the trial court's ruling is allowed to stand, it would effectively eliminate any cause of action for negligent storage of a weapon. Plaintiffs claim that the act of pulling the trigger ultimately required would always operate to cutoff liability.

With respect to Beretta, plaintiffs argue that Beretta's experts conceded that children gain access to guns and that accidental shootings occur, specifically, accidents exactly like the instant scenario. In fact, plaintiffs note that Beretta's expert stated that this type of scenario was the impetus for the creation of the magazine disconnect safety in 1910. Furthermore, plaintiffs note that Beretta manufactured other firearms with additional safeguards. Therefore, plaintiffs conclude that Billy's actions were not an independent intervening cause to absolve Beretta of liability for this tragedy.

Sheahan responds that David's storage of the handgun was a condition and not a cause of the shooting. Where the action of a defendant does not cause the injury, but a third party acting independently causes the injury, the creation of the condition is not a proximate cause. *Young*, 213 Ill.2d at 449, 290

Ill.Dec. 504, 821 N.E.2d 1078. Under *Young*, the key consideration in a case such as this is whether the intervening cause is such that a reasonable person would find it a likely result of the complained of conduct. *Young*, 213 Ill.2d at 449, 290 Ill.Dec. 504, 821 N.E.2d 1078, quoting *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 258, 242 Ill.Dec. 113, 720 N.E.2d 1068 (1999). Sheahan argues that the aforementioned actions of Billy, both criminal and in violation of David's house rules, were not foreseeable to a reasonable person and, therefore, David's actions were not a proximate cause.

Beretta also relies on *Young* to argue that Billy's criminal actions were an unforeseeable intervening cause relieving it of liability as a matter of law. Beretta argues that the adjudication of Billy as delinquent based on his commission of involuntary manslaughter and reckless discharge of a firearm and Billy's testimony affirm that he recklessly pulled the trigger and committed the crime. Beretta also cites to two federal cases that are factually similar to this case for support. ***578***Eichstedt v. Lakefield Arms Ltd.*, 849 F.Supp. 1287, 1291-92 (E.D.Wis.1994) (17-year-old boy's pointing rifle at friend and pulling trigger was reckless by any reasonable person, especially an "experienced handler of guns" like the shooter and summary judgment for gun manufacturer was proper); *Raines v. Colt Industries, Inc.*, 757 F.Supp. 819, 822-26 (E.D.Mich.1991) (summary judgment was proper where the handgun is a simple tool, danger is open and obvious, and shooter had played with gun for two days with prior experience manipulating the gun). Not only are these cases based on Wisconsin and Michigan laws and, as such, are merely persuasive authority, but they are distinguishable on the facts as well. Both cases in-

volved gun users that were both older and more experienced than Billy. Furthermore, as noted below, the exception for the open and obvious danger of a simple product has been rejected in Illinois as a *per se* rule against liability. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 262-63, 309 Ill.Dec. 383, 864 N.E.2d 249 (2007).

Proximate cause may not be proven based upon speculation or surmise, but must be proven to a reasonable certainty. *Bourgonje*, 362 Ill.App.3d at 1007, 298 Ill.Dec. 953, 841 N.E.2d 96. As addressed above, viewing plaintiffs' complaint and evidence favorably, cause in fact was shown because the shooting would not have occurred if the handgun had been properly stored. Second, it was reasonably foreseeable that this type of harm would occur if the handgun was not properly stored based on the testimony of several experts and the specific rules and laws implemented for this exact concern.

The trial court opined that finding proximate cause in this case would create liability for Sheahan for any harm created if a weapon was stolen from an officer. However, plaintiffs do not argue for this extensive a finding. Rather, they point to Billy's testimony that the gun and ammunition were negligently stored in an unlocked case in violation of Illinois law and Sheahan's training and rules. This case is distinguishable from a stolen weapon scenario.

Under plaintiffs' theory, Billy in no way "stole" the handgun, as he never intended to deprive David of possession of the handgun and the underlying negligent storage is the cause of the harm. Whether or not that is the case, the scenario in this case in fact is exactly what the gun storage statute and Sheahan's

own departmental rules and training programs sought to avoid. In this case, a child found an improperly stored gun and played with it. While playing, the gun was accidentally discharged.

With respect to the intervening cause, Billy was adjudicated a delinquent, not convicted of a crime. While this court affirmed the findings of the juvenile court, the proceedings before that court are not of record. Whether Billy's actions were criminal and unforeseeable is an open question considering the fact that he is not a convicted criminal and the evidence presented by plaintiffs. Plaintiffs continue to assert that there was no intervening intentional attack to break the causal chain. In any event, under *Bourgonje,* whether Billy's actions were criminal or tortious in nature under the common law is not necessarily outcome determinative. Furthermore, as noted above, under *Hagan,* public policy dictates a differentiated approach to considering behavior by a child intentional and criminal as compared to that of an adult. We have concluded above that this accident was foreseeable and, therefore, it is a question for the jury.

C. Plaintiffs' Claim the Handgun Was Unreasonably Dangerous

Plaintiffs next argue that the trial court erred in failing to find the handgun unreasonably ***579** dangerous under their strict product liability claim. Plaintiffs dispute Beretta's claim that the sole function of the handgun is to fire a projectile with each pull of the trigger. Plaintiffs argue that the function of the gun changed when Billy removed the magazine because he believed it to be unloaded, as if the safety were engaged, and, essentially, it became a toy gun.

Additionally, they assert that the existence of a manual safety indicates that the handgun did not serve only one purpose, but had shifting functions. Plaintiffs assert that they demonstrated that the handgun was unreasonably dangerous and defectively designed under both the consumer expectation test and risk-utility test for product liability claims as detailed in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 433, 261 Ill.Dec. 744, 764 N.E.2d 35 (2002).

1. Consumer Expectation Test

Under the consumer expectation test, a plaintiff may prove a product defective " 'by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.' " *Hansen*, 198 Ill.2d at 433, 261 Ill.Dec. 744, 764 N.E.2d 35, quoting *Lamkin v. Towner*, 138 Ill.2d 510, 529, 150 Ill.Dec. 562, 563 N.E.2d 449 (1990). Beretta properly notes that the reasonable consumer for this review is not necessarily the user at the time of the incident, but the "typical user and purchaser" of the product, in this case, a licensed firearm owner. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 257, 309 Ill.Dec. 383, 864 N.E.2d 249 (2007).

Plaintiffs cite to the Johns Hopkins study noted above, several cases from foreign jurisdictions, and testimony regarding the long-established patents for magazine disconnect safeties to establish the existence and knowledge of this device. Plaintiffs argue that this evidence demonstrates that it is reasonable an intended user would expect that the removal of the magazine would render the handgun harmless. Plaintiffs note David Swan's testimony that he did

not know the handgun would fire without the magazine engaged. At a minimum, plaintiffs argue that this establishes a question of fact for the jury to determine and not simply take what Beretta says about its product over what the consumer believes.

Beretta argues that application of the consumer expectation test must lead to a finding that the handgun was not unreasonably dangerous. Beretta highlights that it is important to consider the nature and function of the product in addition to determining the ordinary consumer and how the product performed under this test. *Taylor v. Gerry's Ridgewood, Inc.*, 141 Ill.App.3d 780, 784, 95 Ill.Dec. 895, 490 N.E.2d 987 (1986). Beretta first argues that the ordinary consumer of the handgun is not, as plaintiffs assert, a 13-year-old child, but an adult who can better understand the dangers and consequences of handling a firearm.

Beretta asserts that a firearm has been considered an "instrument of death" by the courts and its basic function is purely to discharge a projectile when the trigger is pulled. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Experts for both parties testified that the function of a handgun is not to be a toy, but simply to fire bullets. Accordingly, Beretta concludes that plaintiffs' argument that the presence of a safety on a firearm alters its function.

With respect to the third consideration in the consumer expectation test, Beretta argues that *Taylor* is on point and controlling. In *Taylor*, the adult gun owner and friends had been drinking for hours and playing Russian roulette with his newly ***580** purchased revolver while it was unloaded. When preparing to leave, the owner reloaded the revolver and

placed it on the table telling everyone it was loaded. One friend apparently did not hear this warning, picked up the gun and shot and killed another friend. *Taylor*, 141 Ill.App.3d at 781-82, 95 Ill.Dec. 895, 490 N.E.2d 987.

The estate of the friend who was killed filed a strict liability claim against the manufacturer of the revolver, alleging that the double-action trigger was unreasonably dangerous and that it should have had a manual or automatic safety. The *Taylor* court affirmed the trial court's summary judgment order. The court noted that a manufacturer is not under a duty to design a product that is incapable of preventing injury or include safety features to foreclose any harm to its user. The court found that the plaintiff failed to prove the revolver was defective and that the revolver performed as designed. *Taylor*, 141 Ill.App.3d at 784-85, 95 Ill.Dec. 895, 490 N.E.2d 987.

Beretta asserts that as in *Taylor*, and similar cases following *Taylor*, the handgun performed as expected given its nature and function. As in these cases, Billy was playing with the handgun and it did what it was supposed to, discharging a bullet. Beretta repeatedly highlights the language in *Taylor* that "[o]nly a defective person would fail to realize the obvious dangers associated with these actions." *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987.

Plaintiffs respond that the *Taylor* court made those comments in the context of a situation where grown men had been drinking heavily and playing with a firearm, not a 13-year-old boy simply playing with a gun. We agree with plaintiffs that the instant scenario is distinguishable. We would be remiss if we did not further note our belief that utilizing this lan-

guage is inflammatory and inappropriate in this case. The duty of zealous advocacy does not require counsel to ignore common decency. This case is clearly distinguishable from *Taylor* and involves the tragic loss of a young boy and obvious damage to Josh's family and friends, as well as to Billy, David, and the Swan family. Testimony was received on the disruptive force this has been to all those involved and repeatedly labeling a 13-year-old boy as defective is not only unnecessary, but sad. We note, however, even if we were to accept Beretta's assessment of Billy as defective, it would strengthen the argument in favor of application of the *Hagan* case and allowing the case to go forward as a matter of public policy.

Furthermore, this language is entirely unnecessary considering Beretta's final argument that the handgun was purchased by David and used for law enforcement purposes. This particular model was designed and marketed by Beretta for military and police use. Beretta notes that testimony indicated that the handgun operated properly every time David used it and there had not been any reports of widespread defects of this handgun model. The Cook County Department of Corrections found it to be a safe and reliable firearm suitable for use as a duty pistol. Therefore, the record supports Beretta's conclusion that the handgun performed as expected and was not unreasonably dangerous and summary judgment was proper under the consumer expectation test.

2. Risk-Utility Test

Under the risk-utility test, a plaintiff may establish a defective-design claim " 'by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.' " *581 *Hansen*, 198 Ill.2d at 433, 261 Ill.Dec. 744, 764 N.E.2d 35, quoting *Lamkin*, 138 Ill.2d at 529, 150 Ill.Dec. 562, 563 N.E.2d 449. Under *Calles*, accepted factors to be considered when engaging in a risk-utility analysis are:

" '(1) The usefulness and desirability of the product-its utility to the user and to the public as a whole.

(2) The safety aspects of the product-the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.' " *Calles*, 224 Ill.2d at 264-65, 309 Ill.Dec. 383, 864 N.E.2d 249, quoting J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973).

The *Calles* court also provided four factors to be considered with respect to the utility of a product. These factors are: the appearance and aesthetic attractiveness of the product; the utility for multiple uses; the convenience and extent of use without harm resulting from the product; and the collateral safety of a feature other than the one causing harm to the plaintiff. *Calles*, 224 Ill.2d at 265-66, 309 Ill.Dec. 383, 864 N.E.2d 249, citing American Law of Products Liability 3d § 28:19, at 28-30 through 28-31 (1997).

Plaintiffs argue that they not only showed that a safer alternative design existed, but that Beretta had manufactured such firearms at an admittedly marginal increased cost. Furthermore, Beretta's expert stated that there was no documentation available that the magazine disconnect safety would make the handgun more dangerous. Therefore, plaintiffs conclude that Beretta could have easily and cost-effectively equipped the handgun in a safer manner, but did not and as a result it was unreasonably dangerous.

Beretta claims that *Calles* upheld the "general rule" that manufacturers will not be held liable for harm resulting from a danger that is open and obvious to the typical user. *Calles*, 224 Ill.2d at 262-63, 309

Ill.Dec. 383, 864 N.E.2d 249. However, the *Calles* court specifically rejected this general rule, citing to Illinois and foreign cases rejecting such a rule and the policy reasons supporting these findings. *Calles*, 224 Ill.2d at 263, 309 Ill.Dec. 383, 864 N.E.2d 249. The *Calles* court continued to state that the open and obvious nature of the danger involved is an important factor in the risk-utility analysis, but "[a] *per se* rule would also frustrate the policy of preventing future harm which is at the heart of strict liability law." *Calles*, 224 Ill.2d at 263, 309 Ill.Dec. 383, 864 N.E.2d 249.

In any event, Beretta argues that under the risk-utility test, the product still could not be found unreasonably dangerous. While not *per se* rules, the open and obvious danger of firearms and the intended user, military and police personnel, are both important factors in the calculus under *Calles*. Experts for all parties agreed ***582** that most police officers specifically refuse to utilize a magazine disconnect safety for fear of not being able to utilize their firearm when needed the most. Beretta argues that the testimony of several experts indicated that plaintiffs' proposed magazine disconnect safety would undermine the utility of the handgun as a law enforcement weapon. Beretta highlights witness testimony that over 20 years of requests for firearms from law enforcement agencies have overwhelmingly included specific requests that a magazine disconnect not be incorporated.

Beretta argues that the testimony of several experts indicated that plaintiffs' proposed magazine disconnect safety would undermine the utility of the handgun as a law enforcement weapon. In addition, Beretta points out the additional safety features that

were included on the handgun. Further, with proper storage and handling of the handgun and adequate training, the handgun is not unreasonably dangerous. While, as discussed below, it is arguable that a suitable warning was not provided regarding the dangers involved in handling the handgun, that factor does not outweigh the other factors under *Calles* and the particular needs of police officers and the military. Accordingly, summary judgment was proper on this count under the risk-utility test.

D. Plaintiffs' Failure to Warn Claim

Plaintiffs also argue that the trial court erred by finding that Beretta did not have a duty to warn because of the open and obvious danger presented by the handgun. Plaintiffs again assert that it was reasonable for Billy to believe that the handgun was unloaded and inoperable when he removed the magazine. Plaintiffs assert that an ordinary person would believe the same and that Beretta had a duty to warn based on the level of awareness of an ordinary person. *Sollami v. Eaton*, 201 Ill.2d 1, 7, 265 Ill.Dec. 177, 772 N.E.2d 215 (2002).

Plaintiffs argue that this reasonable belief also removes the risk of the handgun as an open and obvious danger. *Miller v. Rinker Boat Co.*, 352 Ill.App.3d 648, 666, 287 Ill.Dec. 416, 815 N.E.2d 1219 (2004). A manufacturer must provide a warning for a product with dangerous propensities when the seller has greater knowledge of the risk of harm from the product and knows that harm will occur to the buyer absent a warning. *Bates v. Richland Sales Corp.*, 346 Ill.App.3d 223, 232-33, 281 Ill.Dec. 356, 803 N.E.2d 977 (2004). Plaintiffs argue that the warnings provided by Beretta were insufficient. Plaintiffs cite to

testimony that the chamber loaded indicator was hard to see and to the lack of any warning on the handgun that the chamber may be loaded without the magazine engaged. Plaintiffs argue again that foreseeability is the key consideration, without citation to authority for this issue, and that it was clearly proven by the facts of this case.

Beretta responds that summary judgment is appropriate on a failure to warn claim where the party failed to read product warnings. *Kane v. R.D. Werner Co.*, 275 Ill.App.3d 1035, 1037, 212 Ill.Dec. 342, 657 N.E.2d 37 (1995). Beretta argues that Billy testified that he did not read any of the repeated and explicit warnings provided in the owner's manual. Secondly, it argues that no duty to warn exists where the danger involved is open and obvious. *Sollami v. Eaton*, 201 Ill.2d 1, 7, 265 Ill.Dec. 177, 772 N.E.2d 215 (2002). As noted above, the danger of pulling the trigger of a firearm has been found to be open and obvious.

Beretta again cites to *Taylor*, which also involved a failure to warn claim. The *Taylor* court found that the potential danger of *583 pulling a trigger on a firearm is open and obvious. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Beretta also cites to Billy's testimony that he knew he was handling a firearm with the potential to hurt or kill a human being. Therefore, Beretta concludes that the danger was open and obvious, and despite its extensive warnings contained in the owner's manual, Billy recklessly pulled the trigger on the handgun.

Kane does stand for the proposition Beretta claims, however. Its finding was qualified by the court's noting that, if the " 'nature of the alleged inadequacy is

such that it prevents [the party] from reading [the warning],' " a failure to warn claim may stand. *Kane*, 275 Ill.App.3d at 1037, 212 Ill.Dec. 342, 657 N.E.2d 37, quoting *E.R. Squibb & Sons, Inc. v. Cox*, 477 So.2d 963, 971 (Ala.1985). Plaintiffs provide several ways that Beretta failed to warn of the danger the handgun would fire without the magazine engaged. Plaintiffs claim the chamber loaded indicator should have been larger, the manual should have provided better warnings, and additional warnings could have been written on the handgun itself.

Interestingly, plaintiffs argue that *Taylor* was "of course not a warning issue case." However, the *Taylor* court specifically upheld the dismissal of a count sounding in negligence and alleging the revolver lacked adequate safeguards and warnings. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. The *Taylor* court found that the manufacturer's warning to read the instruction manual before use and the warnings provided in the manual were extensive and adequate. Both parties also fail to note that the *Taylor* court specifically stated that rollmarked into the steel barrel of the revolver at question was a warning to read the instruction manual before use. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Because of this, the *Taylor* court concluded that the warning was communicated and the manual contained specific details that, if followed, the shooting would not have occurred.

In this case, the first line of the manual reads in bold and enlarged font "Caution: Read this manual carefully before handling and loading the pistol." As noted above, the manual repeatedly warns the user to make sure the cartridge chamber is empty when

storing the firearm and provides step-by-step instructions on how to accomplish this. The manual clearly reads that removing the magazine does not clear a loaded chamber. However, the manual does not contain any notation or warning whether or not a handgun may fire the chambered bullet when the magazine is removed. Thus, the holding in *Kane* is not helpful to Beretta because even if Billy had read the entire manual, he would not have been warned that removing the magazine does not mean the handgun will not discharge a bullet.

Beretta clearly has greater knowledge of the danger of the handgun than the typical user. The nature of the inadequacy in this case was that a user was not pointed to a warning in any event. Plaintiffs provided evidence that over a third of adults questioned in the Johns Hopkins study either believed that a gun would not fire with its magazine removed or did not know either way. In fact, an experienced user such as David, a trained police officer, did not know that the firearm may fire a bullet with the magazine removed. Therefore, plaintiffs' failure to warn claim presented a question of fact and should have survived summary judgment to determine if Beretta's warnings were sufficient.

E. Protection of Lawful Commerce in Arms Act

Finally, Beretta asserts that this cause of action must be immediately dismissed ***584** pursuant to the PLCAA. Beretta argues that the PLCAA, enacted on October 26, 2005, two months after the trial court granted summary judgment for Beretta, prohibits civil suits against manufacturers, importers, distributors, and dealers of firearms for harms caused by criminal or unlawful third party misuse of fire-

arms that function properly as designed and intended. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. §§ 7901(a)(3), (b)(1)). Beretta argues that the PLCAA retroactively prohibits civil suits such as plaintiffs' under section 7902(b) (Pub.L. 109-12, 119 Stat. 2095, 2096 (2005)) (adding 15 U.S.C. § 7902(b)) and that this court must apply the law as it exists at appeal unless doing so would interfere with a vested right (*Caveney v. Bower*, 207 Ill.2d 82, 85, 278 Ill.Dec. 1, 797 N.E.2d 596 (2003)).

With the PLCAA, Congress sought to protect the gun industry from ruin due to lawsuits under "theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bone fide expansion of the common law" to be possibly sustained by a "maverick judicial officer or petit jury." Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. § 7901(a)(7)). Congress also found that these "qualified civil liability actions" threatened the important principles of federalism, state sovereignty and the separation of powers doctrine. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. § 7901(a)(8)). Section 7903(5)(A) defines a "qualified civil liability action" as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages * * * resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(5)(A)). "Unlawful misuse" is defined as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(9)).

Beretta states that it is unchallenged that it is a manufacturer of guns under sections 7903(2) & (5)(A) of the PLCAA. Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. §§ 7903(2) & (5)(A)). The handgun is a "firearm" and a "qualified product" under the PLCAA. Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(4)). Therefore, Beretta concludes that because Billy was adjudicated a delinquent for involuntary manslaughter and reckless discharge of a firearm, he unlawfully misused the handgun and the action must be dismissed under section 7902(b).

Plaintiffs argue that the PLCAA does not apply to this case. Plaintiffs assert that the target of the PLCAA was actions brought by states, municipalities, interest groups and others attempting to force the gun industry to pay for the crimes of third parties under novel theories. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. §§ 7901(a)(3), (a)(7), (a)(8)). Therefore, an accidental shooting like Billy's that, plaintiffs argue, could have been avoided with additional safety features and proper warnings was not Congress's intended target. Furthermore, plaintiffs argue that their cause of action fits within the exceptions to qualified civil liability actions provided by the PLCAA. The relevant exceptions to the PLCAA are as follows:

> "(ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> * * *
>
> *585 (iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. §§ 7903(5)(A)(ii), (5)(A)(iv), (5)(A)(v)).

Plaintiffs assert that their claims meet the exceptions for negligence and breach of warranty under sections 7903(5)(A)(ii) and 7903(5)(A)(iv) and the exception for actions based on defect or design under section 7903(5)(A)(v). Plaintiffs argue that they overcame the limitations on exception 5(A)(v) for volitional acts that constitute criminal offenses because Billy did not intend to shoot and kill Josh. Plaintiffs argue that Congress's use of " criminal offense" intended the limitation to criminal actions with accompanying *mens rea* and not reckless actions like Billy's. Plaintiffs argue that this court's Rule 23 order affirming the adjudication of delinquency was improperly utilized to establish the criminality of Billy's behavior and that the evidence establishing this is incomplete and not of record. Plaintiffs also assert that their claims against Beretta resulted from the product's condition. Therefore, plaintiffs conclude that Billy's actions were not the sole cause of harm and not covered by the PLCAA.

Plaintiffs finally assert that the PLCAA is unconstitutional because it violates the tenth amendment. Plaintiffs argue that the United States Supreme

Court has clearly stated that the United States Constitution does not grant Congress authority to direct the action of state governments. Rather, Congress may only enact generally applicable laws requiring or prohibiting certain acts and may not command the states to require or prohibit those acts. *New York v. United States*, 505 U.S. 144, 165-66, 178-79, 112 S.Ct. 2408, 2422-23, 2429-30, 120 L.Ed.2d 120, 143-44, 152-53 (1992). Plaintiffs claim that Congress's command to state courts to immediately dismiss qualified civil actions violates the tenth amendment.

Beretta responds that this appeal only involves plaintiffs' claims sounding in strict liability; thus, the negligence and warranty exceptions are irrelevant. Beretta also contends that plaintiffs failed to show that the handgun was used as intended or in a reasonably foreseeable manner and not in a manner that would constitute a criminal offense as required by the exception under section 7903(5)(A)(v). Beretta argues that it was proven that Billy's act in purposefully pulling the trigger was a volitional act that solely caused the harm and was properly found to be a criminal act. Beretta asserts that plaintiffs have tried to avoid this conclusion with meaningless semantics.

Beretta states that Congress repeatedly made clear its intent that the gun industry not be liable for harm caused by criminal and unlawful misuse of its products. Pub.L. 109-12, 119 Stat. 2095 through 2097 (2005) (adding 15 U.S.C. §§ 7901(a)(3) through (a)(5), (a)(7), (a)(8), 7903(5)(A)). Beretta argues that plaintiffs incorrectly claim that the PLCAA does not apply because Billy's conduct was not the "sole cause" of the harm under section 7901(b)(1). Beretta argues that the language of section 7903(5)(A)(v) is

conclusive that if the act in question is found criminal, "such act shall be considered the sole proximate ***586** cause of any resulting death, personal injuries, or property damage." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(5)(A)(v)).

First, we agree with Beretta that plaintiffs have confused Congress's direct regulation and preemption of state law with commandeering state functions. Congress, Beretta correctly asserts, simply established a new federal standard that governs claims against the gun industry, preempting conflicting state tort law, a common action. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571, 116 S.Ct. 1589, 1596-97, 134 L.Ed.2d 809, 823-24 (1996). The PLCAA has been examined by the United States District Courts for the Eastern District of New York and the Central District of California in the context of nuisance claims against gun manufacturers. *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 266-67 (E.D.N.Y.2005); *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D.Cal.2006).

While both of these courts are federal district courts in foreign jurisdictions, their reasoning is sound and we follow these decisions on the constitutional issues. Both of these decisions included detailed examinations of the constitutionality of the PLCAA, including thorough reviews of the legislative history of the statute. In both cases, the courts found that, though there are differing opinions supporting the reasons to protect the gun industry, Congress cited proper support to utilize the commerce clause and the PLCAA was constitutional. *City of New York*, 401 F.Supp.2d at 271-97; *Ileto*, 421 F.Supp.2d at 1298-1304.

Both courts examined whether the PLCAA violated the due process or equal protection clause and whether it was a bill of attainder. Both courts found no violation in these areas, principally from the fact that one does not have a vested right in a lawsuit until a final, unreviewable judgment has been reached. *City of New York*, 401 F.Supp.2d at 271-97; *Ileto*, 421 F.Supp.2d at 1298-1304. With respect to the tenth amendment, the *City of New York* court simply stated there was no violation because Congress is not commandeering the states by means of the Act. *City of New York*, 401 F.Supp.2d at 294. Beretta properly notes that the PLCAA does not compel states to regulate anything or enact any law. The PLCAA simply establishes a federal standard for claims against the gun industry.

It is clear from the PLCAA and legislative history that plaintiffs correctly assert that Congress was primarily concerned with novel nuisance cases like *Ileto* and *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004). However, based on the plain language of the statute, plaintiffs must show they fall within the exceptions to avoid the provisions of the Act. Plaintiffs failed to support their claim that exceptions under section 7903(5)(A)(ii) for negligent entrustment or negligence *per se* and section 7903(5)(A)(iv) for breach of contract or warranty in this case. Therefore, the exception under section 7903(5)(A)(v), which allows for a claim alleging a defect in design or manufacturing, absent a volitional criminal act, is the only applicable exception to this case.

Beretta argues that Billy's testimony and the delinquency adjudication prove that the gun was discharged by a volitional act that constituted a crimi-

nal offense. However, as we have held above, plaintiffs have provided evidence that Billy's actions were not unlawful. While we look at the delinquency adjudication deferentially, it is not the law of this case and not the result of proceedings subject to the protections of the sixth amendment. Whether Billy's act *587 was volitional or whether he understood the ramifications of his conduct to support summary judgment or affording compensation to victims as *Hagan* argues for, is a question for the trier of fact.

We do not have the record of those proceedings before us and do not know the evidence that was presented. We do have the evidence plaintiff has presented in this case supporting a finding that Billy's actions were accidental. Whether Billy's actions were criminal or unlawful is a question of fact for the finder of fact based on all the evidence. If Billy's actions were criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. However, if Billy's actions were found to be purely accidental and not unlawful or criminal, the exception under section 7903(5)(A)(v) would apply and the PLCAA would not preclude plaintiffs' claims against Beretta.

III. CONCLUSION

For the foregoing reasons, we reverse in part and affirm in part the decision of the trial court and remand the matter for further proceedings consistent with this opinion. We note that Sheahan raised sections 2-109, 2-204, 2-201 and 2-202 of the Local Governmental and Governmental Employees Tort Immunity Act as affirmative defenses to the complaint. 745 ILCS 10/2-109, 2-201, 2-202, 2-204 (West 2004). The trial court did not address this issue and our finding that Sheahan is liable under the principle of

respondeat superior does not end the analysis. The existence of a duty and the existence of an immunity are distinct issues that must be analyzed separately. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490, 256 Ill.Dec. 848, 752 N.E.2d 1090 (2001), citing *Barnett v. Zion Park District*, 171 Ill.2d 378, 388, 216 Ill.Dec. 550, 665 N.E.2d 808 (1996).

Affirmed in part and reversed in part, remanded for a new trial.

Presiding Justice QUINN, and Justice CAMPBELL, concur.

APPENDIX C
Order Denying Rehearing (May 26, 2009)

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 26, 2009

Mr. Adam Simon
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Chicago, IL 60601

No. 105789 - Hector Adames, Jr., et al., etc.,
105851 appellees, v. Michael F. Sheahan, etc.,
Cons. et al., appellants.
Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 30, 2009.

Kilbride, J., took no part.

APPENDIX D
Order Granting Defendant Berretta U.S.A. Corp.'s Motion for Summary Judgment on Counts V, VIII, XI, XVII, XX, XXIII, XXVI, and XXXII of Plaintiff's Third Amended Complaint (Aug. 23, 2005)

Circuit Court of Illinois,
County Department Law Division.
Cook County
Hector ADAMES, Jr. and Rosalia Diaz, as Co-Special Administrator of the Estate of Joshua Adames, Deceased, Plaintiff,
v.
David SWANN, Michael F. Sheahan, in his official capacity as Cook County Sheriff, Beretta U.S.A. Corp., and Chicago Ridge Gunshop and Range, Inc., Defendants.
No. 01 L 05894.
August 23, 2005.

Order

Carol Pearce McCarthy, Judge.
This cause coming to be heard on Defendant Beretta U.S.A. Corp's Motion for Summary Judgment on Counts V, VIII, XI, XVII, XX, XXIII, XXVI, and XXXII of Plaintiff's Third Amended Complaint, the Court being fully advised of all premises states as follows:

1. Summary judgment is appropriate where the record taken in light most favorable to the non-movant, shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS, Section 5/2-1005(c) (West 2002).

2. Pleadings, depositions, admissions and affidavits must be strictly construed against the movant and liberally in favor of opponent If material facts are in dispute or reasonable persons might draw different inferences from undisputed facts,

3. Summary judgment is appropriate where clear and free from doubt. It is encouraged as an aid in the expeditious disposition of a lawsuit. *Gilbert v. Sycamore Munic. Hosp.*, 156 Ill.2d 511 (1993).

WHEREFORE, based upon the record herein and for all the reasons stated by Defendant Beretta and all relevant law, Defendant Berretta U.S.A. Corp's Motion for Summary Judgment is granted in its entirety.

ENTERED

Judge Carol Pearce McCarthy

Date ____

APPENDIX E
Constitutional Provisions

U.S. CONST. ART. I § 8

Constitution of the United States
Article I. The Congress
Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. CONST. AMEND. X

Constitution of the United States
Amendment X: Reserved Powers

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F
15 U.S.C. §§ 7901-7903

United States Code Annotated
Title 15. Commerce and Trade
PROTECTION OF LAWFUL COMMERCE IN ARMS

§ 7901. Findings; purposes

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun

Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.

Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States

Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

§ 7903. Definitions

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or

ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record

required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term " negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.